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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of DEPENDABLE DODGE, INC., Protestant, vs. FIAT CHRYSLER AUTOMOBILES, INC., Respondent.	**Protest Nos: PR-2435-15 and PR-2436-15** **RESPONDENT FCA US LLC'S POST-HEARING BRIEF**

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Respondent FCA US LLC ("FCA US") submits this Post-Hearing Brief in connection with the protest commenced by Dependable Dodge, Inc. d/b/a Dependable Dodge ("DDI"). Following a three week merits hearing, the evidence established FCA US has good cause to end its business relationship with DDI under California Vehicle Code Section 3061.

I. INTRODUCTION

Edwin M. Sternfeld, Jr., John Sternfeld and Sandra Sanderson inherited and became the owners of DDI and the real estate where the dealership is located in 2007. The Sternfeld family ran the business vigorously at first but, as the years wore on, their vigor waned. Ms. Sanderson eventually retired, leaving Ed and John Sternfeld (together, the "Sternfelds") to manage the business. Although the Sternfelds initially had plans as early as 2007 to update the facilities, they ultimately decided to leave things as they were. The Sternfelds' refusal to keep pace with changes in their industry, their competition and their sales territory caused their business to plummet. The past five years have seen a marked decline not only in the performance of the dealership, but also in the Sternfelds' willingness and ability to make the necessary investments and operational changes required to allow DDI to flourish.

After half a decade of trying to help DDI improve, and its efforts being largely ignored, FCA US was left with no choice but to pursue termination. The evidence introduced at the hearing in this matter demonstrates that FCA US has "good cause" to terminate the dealer agreements of DDI under California Vehicle Code Section 3061. The public and FCA US deserve a more zealous dealer that is willing and able to adequately meet the needs of the community. For over a half decade, DDI has ranked among the worst of any dealer in California. With each passing year, competing dealerships strengthen their lead over DDI, and similarly situated FCA US dealerships outpace DDI's performance. While sales for FCA US have risen at a record pace and its brands have gained significant market share, DDI's sales have stagnated, averaging less than half of their sales requirements.

DDI's sales performance is but one independent ground upon which to justify the termination of its franchise. As the evidence reflected, its poor sales performance is merely a manifestation of the numerous other flaws in the operation of the business which ultimately rendered the dealership unable to keep pace with the San Fernando automotive market. DDI's sales lagged because, among other reasons:

- Its operators chose not to maintain a competitive and up to date facility;
- Its operators chose not to position the business in a competitive location—especially as the area around the dealership changed over the years;
- Its operators chose not to invest in the business and, indeed, did little or nothing to improve the business since taking it over in 2007;
- Its operators chose not to maintain adequate inventory;
- Its operators chose a conservative business philosophy;
- Its operators chose not to meaningfully invest in advertising;
- Its operators chose not to competitively price their product;
- Its operators chose not to retain and train qualified and competitive personnel;
- Its operators refused to market its products to members of the community with less than ideal credit, thus ignoring and refusing to serve a significant population of the community that DDI purports to serve, and;
- Its operators chose to focus the dealership's efforts away from motor vehicle sales and towards wholesaling parts.

This non-exclusive list illustrates overall operational philosophies and failures that go far beyond sales and impact every key aspect of the dealership. These operational failures prevent DDI from properly serving the community and from upholding its obligations to FCA US.

Although all of the above aspects of DDI's business were the result of the Sternfelds' own business decisions, DDI now seeks to blame others for its failures. DDI blames its competition for pricing vehicles more competitively and advertising more aggressively. DDI blames its location for its poor sales. DDI blames FCA US for not rejecting the dealership during Bankruptcy. DDI even retained an expert just to testify that the dealership should be held to a lower standard than every other FCA US dealership because of these poor operational decisions. Not only is this position wrong, these same operational mistakes by DDI's operators are significant and material breaches of the contract between FCA US and DDI. (Exs. R301, R302, together the "Dealer Agreement.") DDI was <u>contractually required</u> to update its signage and ensure that its facilities were up to date and competitive; to ensure that its sales kept pace with MSR; to execute a competitive advertising campaign; to hire and train qualified personnel; and to carry out its warranty obligations to consumers. DDI has faltered on all of these fronts, thus breaching numerous provisions of its Dealer Agreement and providing further support for termination under California law. To make matters worse, DDI steadfastly ignored FCA US's attempts to help the dealership improve. For years, DDI refused to take any meaningful corrective action and, <u>to this day</u>, still has no plans to improve.

DDI has obstinately refused to cure its numerous, material breaches of the Dealer Agreement that have spanned five years. Now that FCA US has finally determined that it cannot repair this failing business relationship, DDI has sought to block FCA US from terminating the Dealer Agreement by filing the present protest. DDI's numerous material breaches of the Dealer Agreement have damaged FCA US by causing it to lose hundreds of vehicle sales based on state average, and by not representing the brand and company reputation as is expected of all dealerships. And DDI's numerous material breaches of the Dealer Agreement have injured the public by limiting their access to FCA US products and services and denying them of the tax revenues and jobs that a more competitive dealer would generate.

Unless the Board upholds FCA US's decision to terminate its franchise with DDI, the public will remain frustrated by a non-competitive member of its community, and FCA US will remain trapped in this losing enterprise, beholden to a business partner that has no intention of improving its business and who is content to underperform and breach its contractual obligations. DDI's refusal to meet its contractual obligations harms FCA US, and further harms the public.

II. BACKGROUND

A. The Parties

FCA US is the exclusive distributor of Chrysler, Jeep, Dodge, and RAM vehicles in the United States. (Ex. J-1 at ¶1.) FCA US sells vehicles to a network of authorized dealers. Those dealers then sell the vehicles, and provide authorized service to the general, consuming public. DDI is a Dodge and RAM dealership located in Canoga Park, California, which is located north of downtown Los Angeles in the San Fernando Valley. Ed and John Sternfeld took ownership of the business in 2007 under a new agreement with FCA whereby the prior franchise was terminated concurrently with the creation of the new franchise. (Ex. R307, R301, R302; *see* Ex. J-1 at ¶2.) The new franchise was intended to serve consumers in the area surrounding San Fernando, California – the "San Fernando Sales Locality." (*See* Ex. R422A at R422-019.) Within the San Fernando Sales Locality, DDI is responsible for a portion of the area called the "Woodland Hills Trade Zone." (*See id.*; R.T. Vol. IX, 230:2-11 (Frith).)[1]

B. DDI's Contractual Obligations Under the Dealer Agreement

DDI and FCA US entered into the Sales and Service Agreement on July 11, 2007. (Ex. R301.) The Sales and Service Agreement is the contractual agreement between FCA US and DDI that governs DDI's sales and service of Dodge and RAM vehicles. The Sales and Service Agreement incorporates the Sales and Service Agreement Additional Terms and Provisions (Ex. R302), including the May 15, 2013 amendment adding RAM vehicles to the Sales and Service Agreement. (Ex. R302 at 038.) Under the Dealer Agreement, DDI assumed numerous obligations and responsibilities.

For example, DDI agreed to "use its best efforts to promote energetically and sell aggressively and effectively at retail (which includes lease and rental units) each and every model" of Dodge and RAM vehicles that it was permitted to sell. (Ex. R302, § 11(a); Ex. R301, § 4.) DDI further agreed to sell enough Dodge and RAM vehicles to satisfy the contractually defined performance standard called Minimum Sales Responsibility ("MSR"). (Ex. R302, §11(a).) MSR is the number of new retail sales a dealer must sell to equal the state market share in their local market—here, the San Fernando Sales Locality—after adjustment for local market conditions. (*See* Section IV.A.1 *infra.*) In other words, MSR measures how effective a dealer is at promoting and selling vehicles. FCA US measures MSR as a percentage and each dealer is contractually obligated to achieve 100% MSR. A dealer that achieves state average market share meets the minimum contractual requirement of 100% MSR. It is possible for all dealers in a sales locality to meet or

[1] The record citations in FCA US's Post-Hearing Brief are made in conformity with the California Style Manual; the name appearing in parentheticals following the citation represents the witness whose testimony is being cited.

exceed 100% MSR. (R.T. Vol. XII, 169:12-14 (Stockton).) Indeed, reaching 100% MSR is equivalent to earning a passing—but average—grade in school. Many dealers greatly exceed 100% MSR. 99% of MSR and lower is a failing grade.

DDI also assumed contractual obligations under the Dealer Agreement for the servicing of vehicles. Specifically, DDI agreed to:

> Service [FCA US] vehicles actively and effectively and provide and maintain, for servicing [FCA US] vehicles, adequate facilities equipped with the basic tools common to the trade and with special tools and equipment peculiar to [FCA US] products and necessary for servicing and repairing specified [FCA US] vehicles properly, efficiently and competitively.

(Ex. R302 at § 11(b).)

DDI assumed obligations under the Dealer Agreement with respect to the maintenance of its facilities, including that:

> The entire Dealership Facilities including, but not in limitation of the foregoing, new and used vehicle display area, salesrooms, service area, parts and accessories area, building exterior and grounds will be satisfactory to [FCA US] as to appearance and layout, and will be maintained and used as set forth in the Dealership Facilities and Location Addendum. [DDI] shall at all times maintain the Dealership Facilities so that they are of adequate capacity to accommodate [DDI's] total vehicle sales volume and are relatively equivalent in their attractiveness, level of maintenance, overall appearance and use to those facilities maintained by [FCA US's] principal competitors.

(*Id.* at § 11(d)(i).) DDI agreed to "display and maintain brand signs, fascia and other signage in compliance with the policies and guidelines of [FCA US], including any modification or revisions to such policies and guidelines . . . ." (*Id.* at § 11(g).)

DDI also assumed obligations with respect to its personnel. Specifically, DDI agreed that it would employ "such number of competent technicians . . . as may be required to assure prompt, satisfactory and competitive customer service . . . ." (*Id.* at § 11(f)) DDI made the same commitment as to its sales personnel, contractually obligating itself to "employ and maintain for its retail business a number of trained and competent new and used motor vehicle sales" personnel. (*Id.*) DDI also agreed to "cause its service personnel to receive such training . . . to maintain their technical expertise to render competent customer service . . . ." (*Id.*) DDI also agreed to "cause its sales personnel to receive such training . . . to maintain their sales expertise to render satisfactory sales." (*Id.*)

DDI assumed contractual obligations under the Dealer Agreement with respect to its advertising, including "to advertise in the most effective manner to develop public interest and confidence in its dealers and products." (*Id.* at § 12.) In furtherance of this contractual obligation, DDI agreed to "engage in advertising and sales promotion programs and shall use effective showroom displays to help fulfill [DDI's] responsibility to promote [FCA US] products and services vigorously and aggressively." (*Id.*)

C. To 2012: DDI Violated the Dealer Agreement, Failed to Meet MSR and Failed to Implement Meaningful Improvements

Although DDI was able to meet many of its various obligations up to 2010, in 2011 its operational failures and violations of the Dealer Agreements began to reflect in its sales performance. With regard to its sales obligation, DDI attained only 72.58% MSR in 2011, representing a loss of 85 new vehicle sales versus what it was required to sell to meet its contractually required MSR. (Ex. R330 at 012.)[2]

The dealership's lack of effort to improve its operations became noticeable as the dealership's performance started to decline. For example, in 2007, the dealership committed to either renovate the current facility or relocate to a more desirable location. (Exs. R307, R308.) By the time of the notice of termination in late 2015, however, the dealership had taken no steps to accomplish either and, incredibly, now relies on poor facility and poor location as reasons the dealership should not be terminated. This lack of investment in the business is but one reason DDI should be terminated.

Similarly, on May 24, 2011, DDI accepted a $50,000 Dealership Improvement Agreement to use toward new signage in exchange for waiving its protest of a potential new dealership in Van Nuys. (Exs. R315, R316.)[3] DDI took nearly four years—until 2015—to actually install that signage

[2] DDI's overall MSR performance for 2010 was based on its single franchise at the time, Dodge. It was not until February 21, 2012 that DDI was granted an additional RAM franchise through an amendment to the Dealer Agreement. (Ex. R302 at 038.)

[3] In addition to the $50,000 that DDI received for agreeing to the establishment of Van Nuys,

and then only with this termination looming. Since becoming the owners in 2007, the Sternfelds have not made any meaningful investments in the business, which is now reflected in the dealership's sales. Indeed, it appears the only changes made to the facility through the end of the cure period established in 2015 were in response to a lawsuit filed against the dealership in 2015 under the Americans with Disabilities Act (the "ADA"). (R.T. Vol. XIV, 161:18-162:10 (E. Sternfeld).)

By 2012, DDI had repeatedly and consistently failed to meet the contractual requirements set forth in the Dealer Agreement. With regard to its sales obligations, a month-by-month review of DDI's sales figures reveals that the dealership hovered around 50% of its MSR requirements throughout the entire year across all of the vehicle lines carried by the dealership, and was only able to exceed 60% in one month, ending the year with a sub-standard average MSR of 53.15%—49.27% for Dodge Car, 35.90% for Dodge Truck and 79.44% for RAM. (Ex. R329.) This marked decline in DDI's sales record represented a loss of 201 new vehicle sales versus what it should have sold to meet its MSR requirement. (*Id.* at 012.) Further weakening the dealership's performance, DDI also failed to renovate its facilities, install new signage, retain and train qualified personnel, and increase its advertising spend and inventory. (R.T. Vol. I, 55:12-14 (Weeks); Ex. R368 at 003.)

As DDI entered its second year of poor performance in 2012, FCA US became significantly more active in reaching out to the dealership to offer encouragement and advice. DDI was placed in FCA US's "Upgrade Program," which is "designed to identify and communicate with our bottom ten percent [of dealers] in our network that generally are underperforming in sales, Customer Experience Initiative, facility, [and] working capital" among other issues. (R.T. Vol. III, 6:17-23 (Tangeman).) Membership in the Upgrade Program means that the participant is of "[t]he poorest performing dealers in the country and in every state." (R.T. Vol. VIII, 39:5-6 (Chandler).) Once a dealer has been identified as a part of the Upgrade Program, FCA US then examines all aspects of the dealer's

DDI also received another $50,000 for agreeing to the establishment of Rydell. (*See* Ex. R372 at 001; Tangeman Test., Tr. Vol. III at 190:23-191:6; J. Sternfeld Test., Tr. Vol. XIII at 131:9-22; E. Sternfeld Test., Tr. Vol. XIV at 26:10-24.) Though neither dealership was in DDI's trade zone, DDI was compensated a total of $100,000 to waive its protest to their establishment.

operations in order to "identify all areas that in our view would be out of line for [FCA US's] standards, or our contractual obligations between us and the dealer, and work on addressing those conditions to get them improved." (R.T. Vol. III, 7:2-10 (Tangeman).) FCA US's representatives will then proceed to focus its energies on helping the dealer improve in those areas, as FCA US "want[s] them to improve their performance and get better." (R.T. Vol. VIII, 39:19 (Chandler).) When a dealer improves to the point that it can be removed from the Upgrade Program, the dealer is said to "graduate" from the program. (R.T. Vol. III, 7:20 (Tangeman).)

As part of the Upgrade Program, FCA US representatives held in-person and telephonic meetings with DDI in March, May and October of 2012. (*See* Ex. R349 at 005.) FCA US representatives additionally had in-person "MSR Review" meetings with DDI where its operations and performance were discussed. Ed Sternfeld, as a co-owner and general manager of DDI, signed the MSR Reviews, documenting his acknowledgement of the dealership's deficiencies. (*See, e.g.* Ex. R336 at 002; R.T. Vol. XIII, 250:11-19 (E. Sternfeld).)

On April 20, 2012, Jason Stoicevich, then Director for the California Business Center, wrote to Ed Sternfeld to advise him that "[a]chieving less than 100% of MSR is a serious breach of your Sales and Service Agreement and needs to be corrected quickly." (Ex. R347.) Stoicevich requested an in-person meeting with Ed Sternfeld and his sales management team the following month. (*Id.*) Stoicevich explained that DDI would be provided with a detailed market analysis and would be given advice on "marketing strategies to improve sales" which involved the development of a plan to help increase DDI's MSR performance (*Id.*; Ex. J-4_0154:13-20 (Corle Dep.); Ex. J-4_0544:22-25 (Stoicevich Dep.).) For this meeting, "[t]he goal was to work together as business partners to help each other increase sales." (Ex. J-4_0155:19-21 (Corle Dep.); Ex. J-4_0545:5-9 (Stoicevich Dep.) ("we basically opened up from a network perspective, here is the layout of the market and here is where the opportunity lies, and, in essence, help them start on a path to create some action with our assistance.")) Stoicevich also asked DDI "to come forward with an action plan in full preparation for that meeting, which they did not do." (Ex. J-4_0545:1-3 (Stoicevich Dep.).) Instead, the Sternfelds "came into that meeting empty handed and did not have a plan," (Ex. J-4_0545:3-4 (Stoicevich Dep.)), and moreover "were not engaged in the meeting whatsoever, spoke very, very few words."

(Ex. J-4_0575:1-3 (Stoicevich Dep.).) Indeed, from his observation of the Sternfelds at the 2012 meeting, Stoicevich concluded that "[a]fter that meeting, it was my belief that they had zero intention to improve their sales performance." (Ex. J-4_0575:14-15 (Stoicevich Dep.).) The Sternfelds further acknowledged that they took no specific action in response to Stoicevich's April 20 letter. (R.T. Vol. XIII, 152:13-16 (J. Sternfeld); R.T. Vol. XIV, 200:16-18 (E. Sternfeld).) Stoicevich's conclusion was ultimately confirmed by the fact that DDI's "performance only deteriorated while the performance of the [FCA US] brands in California grew at a level second to none in the marketplace." (Ex. J-4_0575:21-23 (Stoicevich Dep.); R.T. Vol. II, 206:23-207:1 (Weeks).)

Following the meeting, on July 2, 2012, Stoicevich sent a follow-up letter to Ed Sternfeld reminding him of DDI's contractual MSR obligations and attaching an "action plan" to assist DDI in meeting these obligations. (*See* Ex. R348.) In spite of this assistance, DDI "essentially didn't change much" in the months following the meeting, as indicated in a report prepared by Weeks shortly thereafter. (Ex. R364.) Among other things, DDI continued to maintain its inventory at an amount that "is not at a level to attain MSR." (Ex. R.364 (noting only "63 units in stock" at the dealership.); *see also* Ex. R368 at 003 (DDI "was stocking between 65 and 75 new vehicles for several months in 2012.").) DDI's advertising was also severely under-funded and under-performing, as Weeks recorded that the dealership at the time "is ranked in the bottom 3 in LA North in unique visits to the website." (Ex. 364; *see also* Ex. R368 at 003 ("[DDI] has had problems maintaining an internet staff and for one stretch had no internet managers in 2012."; "Dependable is in the bottom two every month in LA North for unique web visits and sales leads.")) DDI's personnel issues also persisted during this time period, as the dealership's "staffing levels in the sales department were not sufficient to hit their minimum sales responsibility." (R.T. Vol. I, 110:8-25 (Weeks).)

By letter dated October 3, 2012, FCA US detailed for DDI its "significant concerns regarding [the] dealership's sales performance" and informed DDI of the ways FCA US could "assist [DDI] to improve [the] dealership's sales performance." (Ex. R349 at 004.) The letter further informed DDI that its 2012 year-to-date overall MSR was one of the lowest in California—ranking DDI 96 out of 113 dealerships. (*Id.* at 005.) FCA US included an Appendix to the letter providing "a wide array of tools and programs designed to help . . . dealers address operational and performance issues." (*Id.* at 006-007.) However, DDI never contacted FCA US in response to this letter and appendix of tools, nor did the dealership make any changes in its operations in response to the letter. (R.T. Vol. III, 99:18-100:10 (Tangeman); R.T. Vol. XIII, 155:6-8 (J. Sternfeld); R.T. Vol. XIV, 201:24-202:7 (E. Sternfeld).)

D. To 2014: DDI Continues to Violate the Dealer Agreements and Breach Its MSR Requirement Despite Offers of Assistance from FCA US

DDI's performance worsened through 2013 as it continued to ignore its contractual obligations. This willful neglect by DDI resulted in dismal sales figures, as its MSR for the year plummeted to 46.03%—47.06% of requirements for Dodge car, 20.74% of requirements for Dodge truck, and 77.08% of requirements for RAM—and dipping as low as 37.42% in the month of June for all of the vehicle lines carried by the dealership. (Ex. R328 at 012.) Performing even worse than it did in the prior year, DDI's poor sales performance equaled a loss of 326 new vehicle sales versus what it was required to sell to meet its MSR requirements. (*Id.*)

DDI's poor performance at this time bore a direct relationship to the Sternfelds' operation of the dealership and violations of the Dealer Agreement. For example, as described above, FCA US granted DDI $50,000 for the purpose of updating their signage in 2011. However, DDI still had not taken any actions to make use of these funds and had not made any signage upgrades. By letter dated March 14, 2013, FCA US notified DDI that it was "part of a shrinking minority that has not yet invested in our mutual success by making the decision to upgrade your outdated signage, the display of which damages our brands and presents an inconsistent message to your customers." (Ex. R371.) Yet the Sternfelds' intransigence persisted and they did nothing to improve their facilities in 2013. DDI also had significant issues with its personnel, experiencing an inordinately high volume of employee turnover. (*See* R.T. Vol. XIII, 88:6-92:15 (J. Sternfeld).) DDI also continued to provide inadequate training for its personnel, as evidenced by an email from Weeks to Ed Sternfeld encouraging the dealership to rectify this deficit. (Ex. R378; R.T. Vol. I, 112:22-24 (Weeks) ("Q: When you look at page 2 of Exhibit 378, were any of the [DDI] employees fully trained? A: No.") Indeed, many of the problems DDI faced in 2013 were the same exact problems that DDI had experienced in the past two years yet had done nothing to rectify. As noted in an internal FCA US email from Weeks to FCA US representatives Agnes Gifford and Jeff Clark, Weeks noted that his ongoing advice in his "numerous MSR conversations with Ed [Sternfeld was] always the same theme: stock more cars, advertise more, and add more internet personnel and consider a change in management." (Ex. R374 at 001; *see also* R.T. Vol. XIII, 254:17-22 (E. Sternfeld).) DDI neglected FCA US's advice; DDI continued to allow these problems to persist, thus continuing to allow their performance to increasingly decline.

Nevertheless, FCA US continually made its representatives available to meet with Ed and John Sternfeld face-to-face and by phone to discuss ways to improve DDI's performance. (*See, e.g.* Exs. R372, R375, R378, R382, R383; R.T. Vol. III, 18:11-19:17 (Tangeman).) Among other things, DDI representatives had in-person meetings with the Sternfelds regarding DDI's performance in FCA US's Customer Experience Initiative ("CEI") [4], and also gave the dealership an "Action Plan" advising it on areas for improvement. (Ex. R375.) FCA US's efforts were largely ignored, however, as DDI's "sales advocacy scores"—a customer satisfaction statistic generated from customer surveys—remained extremely inconsistent, at times placing DDI at the bottom of California dealers in the same size group as DDI. (Ex. 394; R.T. Vol. I, 147:13-19 (Weeks) ("Q: With respect to the scores at this point in time for sales and service advocacy, what – where did that place [DDI] within group size c? A: It placed them at the bottom for sales advocacy."); R.T. Vol. III, 78:7-18 (Tangeman).)

Additionally, Weeks continued to have weekly calls with DDI's sales manager during this time and also visited the dealership in person on a monthly basis. (Ex. J-4_0042:18-43:8 (Attia Dep.); *see also id.* at J-4_0066:14-17 (Attia Dep.) ("Q: Have you asked anything of Steve Weeks that he – well, have you asked him for anything that he hasn't come through on? A: No."); R.T. Vol. XIII, 60:23-63:16 (J. Sternfeld) (acknowledging that the FCA US representatives visiting DDI had

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[4] *See* R.T. Vol. III, 76:3-11 (Tangeman) ("CEI scores are derived by sending e-mail surveys to customers right after the sales operation side. After the vehicle is sold from the dealer, the survey is sent, and then after the repair order ticket and service is closed out, then a survey is generated as well for the customer from service.")

been "respectful" and "professional").) In spite of this constant contact and assistance from FCA US, the Sternfelds steadfastly ignored FCA US's letters, offered no written response, and failed to implement any operational changes. (R.T. Vol. III, 12:14-13:11 (Tangeman) ("Q: Has anyone from the dealership ever tried to contact you directly about the letters that you were sending? A: Not that I recall. The meetings that we had were on our initiative, not there's [sic]. Q: Has anyone from the dealership presented you with a business plan to improve? A: Not that I recall. Q: To your knowledge, has the dealership changed anything about its operations to improve in response to the letters that it was receiving? A: Not that I'm aware of."))

By letter dated October 23, 2013, FCA US again reminded DDI "of the wide array of tools and programs available to you on DealerConnect to help improve your performance across a variety of metrics." (Ex. R350 at 001.) Due to DDI's significant deficiencies as outlined in this letter, FCA US notified DDI that it would be closely monitoring the performance of the dealership for 90 days. (Ex. R350 at 001, 004.) As to DDI's sales deficiencies, the October 23 letter pointed out that, for the year-to-date, the dealership was "barely reaching a third of its MSR obligation." (Ex. R350 at 002.) The October 23 letter further advised that DDI's poor sales translated to numerous lost sales opportunities in its own trade zone, as was apparent from the fact that DDI "sold only 27.2% of new CG line vehicles registered in its trade zone." (Ex. R350 at 002.) Yet the Sternfelds took no action in response to this letter. (R.T. Vol. XIII, 158:3-5 (J. Sternfeld); R.T. Vol. XIV, 202:12-18 (E. Sternfeld).)

DDI's performance in 2014 continued to hover around half of its contractual obligation. DDI's MSR reached only 60.44% for the year—65.07% of requirements for Dodge car, 32.84% of requirements for Dodge truck, and 80.66% of RAM—representing a total of 271 new vehicle sales lost from what it would have sold to meet its MSR requirements. (Ex. R327 at 012.) Customers continued to drive past DDI's dealership to purchase cars from other FCA US dealerships located miles away, as reflected in pump-in reports which were readily available to DDI. (*See* Exs. R334, R335.) The pump-in reports reflect that customers living near DDI elected to instead leave the area to purchase their vehicles from other FCA US dealerships located further away than DDI. The reports are significant because they show that there are customers purchasing FCA US products in

DDI's area, but that DDI was not serving these customers due largely to the operational failures discussed throughout this brief and during the merits hearing.

Following up on its October 23, 2013 letter, FCA US sent a letter dated January 13, 2014 to remind DDI of "the seriousness of [DDI's] ongoing performance deficiencies" and that the dealership's performance remained under a 90 day monitoring period. (Ex. R351 at 002.) The January 13 letter points out that the "dealership is not even reaching half of its MSR obligation," representing 289 lost sales. (*Id.* at 003.) The January 13 letter further pointed out that DDI's poor sales translated to numerous lost opportunities in its own trade zone, as was apparent from the fact that DDI "sold only 25% of new CG line vehicles registered in its trade zone." (*Id.*) Despite the serious nature of this letter, DDI did not reach out to anyone at FCA US regarding this letter. (R.T. Vol. XIV, 202:19-203:7 (E. Sternfeld).)

FCA US continued to offer its support and encouragement to DDI, sending additional correspondence and requesting in-person meetings with DDI's management, including an in-person meeting held with FCA US representatives and Ed Sternfeld in August, 2014 at FCA US's California Business Center. (*See, e.g.* Ex. R382, R383; R.T. Vol. I, 163:24-165:6 (Weeks).) "The purpose of the meeting was to again discuss [DDI's] performance." (R.T. Vol. III, 18:21-19:17 (Tangeman).) As with prior Business Center meetings, DDI did not bring a business plan explaining any intentions to change or improve operations. (R.T. Vol. I, 165:1-3 (Weeks); R.T. Vol. III, 21:7-9 (Tangeman).) Although the Sternfelds discussed an increase of their advertising as a result of the Business Center meeting, this change was inadequate and, as a result, "nothing changed." (R.T. Vol. III, 19:18-20:2 (Tangeman).) FCA US representatives also continued to conduct in-person MSR Review meetings with DDI where their performance was specifically discussed in relation to their MSR requirements, and Ed Sternfeld signed the MSR Review, documenting his acknowledgement and awareness of the dealership's deficiencies. (*See* R.T. Vol. II, 68:13-69:7 (Weeks) (reviewing Ex. 326).)

Due to DDI's continued underperformance, FCA US sent another follow-up letter on May 14, 2014, informing DDI that its monitoring period would be extended an additional 90 days. (Ex. R353.) Reviewing the significant shortfalls in DDI's most recent sales activities, FCA US concluded that DDI "is not performing at an acceptable level with respect to its sales performance and, therefore, is in breach of a material term of the Dealer Agreements." (*Id.* at 004.) Yet DDI took no actions in response to this letter. (R.T. Vol. XIV, 203:8-20 (E. Sternfeld).) A similar letter was sent by FCA US to DDI on August 7, 2014, reiterating the deficiencies pointed out in prior communications. (Ex. R354.) Again, no action was taken by DDI in response to this letter. (R.T. Vol. XIV, 203:21-204:9 (E. Sternfeld).)

E. The Notice of Default, DDI's Continued Decline, & the Notice of Termination

After years of poor performance and attempted help from FCA US, DDI still failed to improve. On October 22, 2014, FCA US issued a Notice of Default to DDI stating that it was "in material breach" of "each of the Dealer Agreements." (Ex. R355.) The notice further informed DDI that failure to cure its contractual breaches would result in FCA US exercising "its rights and remedies pursuant to the Dealer Agreements"—and those under California law—"including, without limitation, terminating the Dealer Agreements." (*Id.*) In the notice, FCA US again explained that DDI's MSR through June 2014 had reached only 59.9%—representing 135 lost sales versus its MSR. (*Id.* at 002-003) FCA US offered DDI a six month "cure period" to bring its dealership into compliance and again provided DDI with a list of resources to help. (*Id.* at 003) As with prior correspondence from FCA US, DDI made no response to the Notice of Default and, in fact, <u>its performance even declined during the cure period</u>.[5]

While DDI was under its Notice of Default, FCA US continued to maintain contact with the dealership and with the Sternfelds. FCA US sent DDI follow-up letters on February 26, 2015, and April 23, 2015, informing it that the dealership remained in default. (Exs. R356, R358.) DDI continued to struggle and underperform in 2015 despite the Sternfelds' understanding that their business was under intense scrutiny. (*See* Ex. R326.) DDI's "sales advocacy scores"—a customer satisfaction statistic generated from customer surveys—also fluctuated significantly during this time

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[5] Notably, the Sternfelds could not even recall having seen the Notice of Default letter at the time of their depositions in this case and acknowledged that after they received the letter they may have thrown it in the trash. (R.T. Vol. XIII, 174:14-17 (J. Sternfeld); R.T. Vol. XIV, 204:14-205:1 (E. Sternfeld).)

period, ebbing as low as 33.3%. (Ex. R.393 at 002; *see also* R.T. Vol. I, at 137:18-25 (Weeks) (defining "sales advocacy").)

At this point, DDI still had not made any renovations to its signage, and indeed its showroom façade and street-front signage looked much the same as pictures of the dealership taken decades earlier. (*Compare* Ex. P181, tab 11 at 2-4; R.T. Vol. XII, 195:18-196:7 (Stockton); *with* Ex. R405; R.T. Vol. X, 113:5-114:13 (Frith).)

However, during this same time period, neither the Sternfelds nor anyone else at DDI made direct contact with any FCA US representatives to discuss the issues presented in the Notice of Default. (R.T. Vol. III, 112:23-25 (Tangeman); R.T. Vol. VIII, 43:11-25 (Chandler).) Instead, on April 27, 2015, three days before FCA US's Notice of Default was set to expire, six months after it had begun, DDI responded to FCA US with a one-page, bare bones document that merely recited its intention to upgrade its computer and telephone systems and its aspirations to complete facility renovations at some point in the future. (Ex. R360.) However, after years of the Sternfelds' poor management and obstinate refusal to make the reasonable, contractually required upgrades requested by FCA US, this one page letter was insufficient and, indeed, DDI never actually completed the upgrade of the phones as it stated it would.

Ultimately, DDI failed to cure its contractual deficiencies before the end of the cure period. Indeed, DDI's sales materially <u>declined</u> during the cure period. For its Dodge franchise, DDI's MSR achievement dropped from 51.8% in October 2014, the month before the cure period commenced, to 41.8% in April, 2015, the final month of the cure period. (Ex. R361 at 003; R.T. Vol. VIII, 44:20-23 (Chandler).) For its RAM franchise, DDI's MSR achievement dropped from 79.7% in October, 2014 to 76.3% in April, 2015. (Ex. R362 at 003; R.T. Vol. VIII, 44:20-23 (Chandler).) And although the cure period had expired on April 30, 2015, FCA waited to issue its Notices of Termination until well past the end of the cure period in the hope that DDI would use this additional time to improve. (R.T. Vol. VIII, 46:9-11, 100:19-25 (Chandler).) DDI did not. Accordingly, on November 4, 2015, as its "last resort," FCA US sent DDI Notices of Termination for both its Dodge and RAM franchises (together, the "Notice of Termination"). (R.T. Vol. III, 16:15-16 (Tangeman); Exs. R361, R362.)

The decision to terminate DDI's franchise was not taken lightly and was made only after consultation amongst numerous FCA US representatives, including: Chandler in his former capacity as National Dealer Placement Manager; FCA US's "regional manager," Tangeman in his former capacity as Network Development Manager for FCA US's California Business Center; and other "representatives from the California Business Center." (R.T. Vol. III, 13:12-14:2 (Tangeman).) And this collective decision was made with consideration and discussion of "all the information available to" these individuals regarding DDI's various failings, as explained above, occurring over the preceding four years. (R.T. Vol. III, 13:12-14:2, 15:20-16:6 (Tangeman); R.T. Vol. VIII, 45:1-14 (Chandler); *see also* R.T. Vol. IV, 188:1-21 (Tangeman).) Accordingly, the Notice of Termination stated that DDI's Dodge and RAM franchises were being terminated pursuant to California law as well as paragraphs 28(b)(i) and (ii) of the Dealer Agreement. (Ex. R361 at 001; Ex. R362 at 001.) Importantly, paragraphs 28(b)(i) and (ii) permit FCA US to terminate the Dealer Agreement based on the breach of various other provisions of the Dealer Agreement that are incorporated into paragraph 28 by reference. Among other things, paragraph 28(b)(i) and (ii) permit FCA US to terminate the Dealer agreement based on DDI's failure to meet its sales obligations pursuant to paragraph 11(a), based on DDI's failure to adequately service vehicles pursuant to paragraph 11(b), based on DDI's failure to maintain up-to-date facilities pursuant to paragraph 11(d)(i) and 11(g), based on DDI's failure to retain and train qualified personnel pursuant to paragraph 11(f), and based on DDI's failure to sufficiently advertise pursuant to paragraph 12. (Ex. R302 at §28.) Because all of the above defects in DDI's operations also constitute material breaches of the Dealer Agreement, all of the above defects in DDI's operations were incorporated into the Notice of Termination through specific citation to paragraph 28. (R.T. Vol. VIII, 56:4-19, 58:12-59:14, 132:1-133:10 (Chandler).)

F. DDI's Protest, the Hearing and the Market Drive

DDI responded to the Notice of Termination by filing this protest, which resulted in a statutory stay of the termination pending a determination of "good cause" under Sections 3060 and 3061 of the California Vehicle Code. Pursuant to Section 3066(a) a hearing was held in this matter commencing on August 15, 2016 (the "Hearing"). Fifteen days of evidence were heard from seven witnesses called by FCA US and three witnesses called by DDI. Evidence was closed after the final day of the hearing on September 29, 2016. At the Hearing, FCA US called the following FCA US representatives to testify:

Steve Weeks	Weeks is the Area Sales Manager for FCA US's Los Angeles North sales area, and is responsible for the San Fernando Sales Locality in which DDI is located. (R.T. Vol. I, 51:14-53:9 (Weeks).) Weeks' responsibilities include consulting with DDI about its retail sales operations, facilities, advertising, and sales personnel obligations. (*Id.*) Weeks has been employed with the company for 31 years and was the "on the ground person interacting the most with" DDI. (R.T. Vol. III 12:6-9 (Tangeman).)
John Tangeman	Tangeman is the current Dealer Placement Manager and former Network Development Manager for FCA US's California Business Center, which includes the San Fernando Sales Locality. (R.T. Vol. II, 228:6-229:23 (Tangeman).) As Network Development Manager, Tangeman managed dealer performance, customer satisfaction initiatives, and the appointment of new dealers in the California Business Center. (*Id.*) Tangeman has over 27 years of experience working with the company. (*Id.* at 228:2-3.)
Bashar Cholagh	Cholagh is the current head of FCA US's market representation department, which is responsible for dealer network planning and analysis, understanding market intelligence, market share performance, consumer buying patterns, demographic analysis, and dealer performance reporting. (R.T. Vol. V, 5:24-6:2, 12:9-22 (Cholagh).) In particular, the dealer performance reporting component includes the formulation and assessment of FCA US dealers' MSR requirements and achievement. (*Id.* at 14:10-14.) Mr. Cholagh has 12 years of experience in the automotive industry and has been employed with FCA US since 2013. (*Id.* at 12:6-8.)
Chris Chandler	Chandler has worked in various capacities at FCA US over the course of his 33-year career with the company and was the National Dealer Placement Manager leading up to and during the time that the decision was made to terminate DDI's franchise. (R.T. Vol. VIII, 5:7-6:2 (Chandler); R.T. Vol. III, 10:18-11:1 (Tangeman).) Chandler is currently employed by FCA US as the Senior Dealer Network Manager in the Southeast Business Center. (R.T. Vol. VIII, 5:7-8 (Chandler).)

Gordy Nevers	Nevers is the current Senior Dealer Network Manager for FCA US's California Business Center, which includes the San Fernando Sales Locality. (R.T. Vol. VIII, 150:7-11 (Nevers).) Nevers' responsibilities include maintaining dealer performance, including sales, service, parts, and customer satisfaction. (*Id.* at 150:12-15.) Nevers is also responsible for all dealer representation in the California Business Center. Though he assumed this role at FCA US as of December 1, 2015, Nevers has 33 years of experience at FCA US. (*Id.* at 150:3-4.)
Herb Walter	Walter is an independent consultant with more than 35 years of financial and management consulting experience. (Ex. R423A at 001.) Walter is a retired partner of PricewaterhouseCoopers LLP, where he worked for 32 years. (*Id.*) Walter evaluates the financial condition and financial performance of numerous companies across a variety of industries, and in particular automobile dealerships. (*Id.*) Walter was offered by FCA US as an expert witness at the Hearing.
Jonathan Frith	Frith is the Vice President of Expert Analytical Services for Urban Science, a consulting company that analyzes opportunities and performance measures primarily for the automobile and financial industries, and in particular, analysis of automobile manufacturer dealer networks. (Ex. R422A at 002; R.T. Vol. IX, 211:10-20 (Frith).) Frith has worked at Urban Science for over 36 years. (*Id.* at 214:2-3.) Frith was offered by FCA US as an expert witness at the Hearing.

FCA US called several other witnesses in its case in chief that are not employed by FCA US, as follows:

Bob Nouri	Nouri is the current owner of West Valley Chrysler Jeep ("West Valley"), which is located directly across the street from DDI on Roscoe Boulevard. (R.T. Vol. VII, 7:11-22 (Nouri).) Nouri purchased the dealership from its former owner, David Ellis, in November 2015, and has since caused substantial improvement in the sales at West Valley. (*Id.* at 8:19-9:16, 11:2-17.)
Eric Van Ace	Van Ace is the current general manager of West Valley. (R.T. Vol. VII, 105:12-18 (Van Ace).)
Hennessey Jonas	Jonas is an internet manager at DDI, and has been working at the dealership since May, 2016. (R.T. Vol. VI, 6:14-23 (Jonas).)

The parties also stipulated to the admission of certain portions of the deposition transcripts of the following witnesses who were deposed but not called live at the Hearing:

Amir Attia	Attia is the current sales manager of DDI. (Ex. J-4_0010:2-4 (Attia Dep.).)
Jeffrey Clark	Clark is the current service and parts area manager for FCA US in the Los Angeles North area, and is responsible for DDI as part of his territory. (Ex. J-4_0074:5-9, J-4_0075:8-13 (Clark Dep.).)
Steve Corle	Corle is FCA US's current national manager for facility and dealership identity, and was previously FCA US's dealer network manager for the California Business Center. (Ex. J-4_0124:14-0125:12 (Corle Dep.).)
Vicki Derengowski	Derengowski is DDI's office manager, and is generally responsible for keeping the business's accounting and documents in order. (Ex. J-4_0188:25-J-4_0189:5, J-4_0196:7-10 (Derengowski Dep.).)
Agnes Gifford	Gifford is a former employee at FCA US. During her 10-year tenure with FCA US, Gifford served as head of customer experience, dealer network manager, and business improvement manager for the company. (Ex. J-4_0279:18-J-4_0280:9 (Gifford Dep.).)
Barbara Johnson	Johnson is an employee at Wells Fargo Dealer Services, and is the relationship manager for DDI. (Ex.J-4_0345:16-J-4_0346:15, J-4_0348:7-14 (B. Johnson Dep.).)
Alexander Sbardellati	Sbardellati is an employee with the Los Angeles Department of Building and Safety, and is responsible for, among other things, processing construction permit applications. (Ex. J-4_0433:24-J-4_0435:17 (Sbardellati Dep.).)
John Springer	Springer is FCA US's service and parts manager for the California Business Center. (Ex. J-4_0516:3-9 (Springer Dep.).)
Jason Stoicevich	Stoicevich is a former employee of FCA US. At FCA US Stoicevich had the role of head of Fiat for North America and the director for the California Business Center. (Ex. J-4_0556:7-17 (Stoicevich Dep.).)
Dean Taylor	Taylor is DDI's parts department manager. (Ex. J-4_0597:17-22, J-4_0598:11-13 (Taylor Dep.).)

The testimony provided by each and every one of these witnesses reinforces that good cause exists to terminate DDI's franchises. The parties also conducted a market drive on August 29, 2016 in which the DDI dealership was surveyed in-person and a tour was conducted of the San Fernando Sales Locality in which DDI is located. (*See* Ex. J-3.) The results of the market drive establish clear, physical proof that good cause exists compelling the termination of DDI's franchises. As explained below, however, the market drive does not fully represent the dealership's condition in the recent past. The façade and signage of the dealership were replaced only a few months prior to the market drive, along with improvements to the bathrooms and concrete pathways performed in response to an ADA lawsuit. (*See* Section IV.A.4.ii, *infra.*) And additional work had been performed on the dealership in the days leading up to the market drive. (R.T. Vol. VII, 115:3-6 (Van Ace).) The new vehicle inventory held at the dealership had also been increased dramatically leading up to the market drive. (*See* Section IV.A.4.iv, *infra.*)

For the reasons explained below, FCA US respectfully submits that all seven of the "good cause" factors of Section 3061 were amply demonstrated through the evidence introduced over the course of the Hearing and that termination of DDI's franchises is warranted.

III. LEGAL STANDARD

Under California Vehicle Code 3066(b), FCA US has the burden of establishing good cause by a preponderance of the evidence. Cal. Evid. Code § 115 (defining "burden of proof"). In determining whether good cause has been shown, the Board "shall take into consideration the existing circumstances, including, but not limited to":

> (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
>
> (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
>
> (c) Permanency of the investment.
>
> (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
>
> (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
>
> (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.
>
> (g) Extent of franchisee's failure to comply with the terms of the franchise.

Cal. Veh. Code § 3061.

"In determining whether good cause has been established, the Board ***must consider all of the factors set forth in section 3061 for which evidence has been presented from any party.***" *Ford Motor Co. v. New Motor Vehicle Bd.* (Jan. 29, 1997) Cal. Super. Ct., No. 96CS0247, at 3-4 (The reasons listed in the notice of termination did not "limit the Board as to the [section 3061] factors it could consider had evidence been presented on any additional factors ***by either party.***") (emphasis added). However, FCA US does not need to prevail on—or even offer evidence of—all of the factors in section 3061. Rather, the Board is "required to weigh the ***relevant*** factors and determine ***whether the weight of those factors favors termination of the franchise*** or its continuation." *Id.* at 3 (emphasis added). Moreover, "section 3061 expressly states the listed factors are not exclusive, and 'the board shall take into consideration the existing circumstances.'" *Duarte & Witting, Inc. v. New Motor Vehicle Bd.,* (2002) 104 Cal. App. 4th 626, 642.

When the evidence in this case is weighed against the specific factors in section 3061, there is only one conclusion: FCA US has good cause to terminate its Dealer Agreement with DDI.

IV. FCA US HAS ESTABLISHED "GOOD CAUSE" TO TERMINATE ITS FRANCHISE WITH DDI

A. DDI Is Unable to Achieve an Amount of Sales Commensurate with the Business Available to It

The first good cause factor looks at the amount of sales DDI has attained relative to the business available to it. Cal. Veh. Code § 3061(a). Poor sales alone may be sufficient to warrant the termination of a dealer, as "nothing in [section 3061] prohibits a finding that, in any given set of facts, one factor may be so egregious that it would outweigh any remaining factors as to which proof was adduced." *Ford Motor Co. v. New Motor Vehicle Bd.* at 5. Although good cause exists on numerous grounds warranting the termination of the dealership, DDI's five years of substandard sales is "so egregious that it would outweigh any remaining factors" and is sufficient by itself to establish good cause. (*Id.*) Though DDI never requested to have FCA US adjust its MSR requirement, the evidence introduced at the Hearing confirms that DDI has fallen woefully short of those requirements for the past half-decade. Because the first element of the Board's consideration is whether the dealership captures the business available to it, DDI's MSR failures bears a direct relation to a finding in favor of termination as to this factor.

1. <u>MSR is a fair and accurate measure of the business opportunities available to DDI and satisfies Cal. Veh. Code § 11713.13(g)</u>

Stated simply, MSR measures a dealer's sales relative to the sales in the market—the precise question posed by the first good cause factor. (R.T. Vol. IX, 228:12-15 (Frith); Ex R302 §11(a).) MSR is a reasonable—if not conservative—benchmark for sales performance and is commonly utilized in the automobile industry. (R.T. Vol. X, 50:9-18 (Frith).) This expected level of sales is derived from the average sales of FCA US dealers across the State of California, subject to adjustments accounting for local variation. (R.T. Vol. X, 9:2-4 (Frith).) And a dealer's measure of actual sales achievement relative to its expected level of achievement is commonly referred to as "retail sales effectiveness." (Ex. R422A at R422-005, ¶ 9.) Each FCA US dealer is contractually obligated to achieve 100% MSR. (*See* Ex. R302 at ¶ 11(a).) Achieving 100% MSR does not mean a dealer's sales were perfect. Reaching 100% MSR is equivalent to earning a passing—but average—grade in school. Many dealers can and do greatly exceed 100% MSR, signifying above-average sales performance in their assigned territory. All dealers can maintain 100% MSR at the same time, and it is possible for all dealers to simultaneously exceed 100% MSR. (R.T. Vol. XII, 169:12-14 (Stockton).)

MSR is calculated through a formula accounting for two basic variables: vehicle registrations and geography. In terms of geography, the essential building blocks of the territories on which MSR is measured are "census tracts," which are defined by the U.S. Census Bureau. (R.T. Vol. IX, 232:21-233:24 (Frith); R.T. Vol. V, 15:20-16:3 (Cholagh).) Adjoining census tracts are collected together to make up a dealer's Trade Zone, such as DDI's Woodland Hills Trade Zone. (R.T. Vol. IX, 231:10-232:5 (Frith); R.T. Vol. V, 16:4-21 (Cholagh).) Multiple Trade Zones are combined to make up a Sales Locality, such as the San Fernando Sales Locality. (R.T. Vol. IX, 231:10-232:5 (Frith); R.T. Vol. V, 16:4-17:6 (Cholagh).) In other words, if a Sales Locality were a pie, Trade Zones would make up the slices. (R.T. Vol. V, 16:4-7 (Cholagh).) Sales Localities are determined by looking at the actual shopping patterns of consumers, as measured by the specific geographical locations of the individuals who purchase automobiles. (R.T. Vol. V, 16:22-17:6 (Cholagh).) The

Trade Zone incorporates this data, and also uses the actual distance of a dealer to census tracts to determine whether that dealer should be responsible for that tract. (R.T. Vol. V, 17:12-18:13 (Cholagh); R.T. Vol. IX, 231:10-24, 232:9-19 (Frith).) Because consumer shopping behavior is incorporated into this analysis, a mountain or other geographic feature, such as a body of water, would typically separate Sales Localities and Trade Zones from one another. (R.T. Vol. V, 18:9-13 (Cholagh); R.T. Vol. IX, 231:10-232:5 (Frith) ("Basically, it's a set of census tracts where a particular dealer has an advantage over other dealers of the same brand in terms of servicing those customers.")) If the geographic conditions of a dealer's location indicate that the dealer is geographically blocked from certain customers, the dealer is not assigned responsibility for those geographic areas.

FCA US's process of assigning Trade Zones and Sales Localities provides an additional benefit to dealers. Specifically, the process of determining these territories allows some geographic areas to be maintained around a dealer's assigned territory that are not assigned to that dealer, and also are not assigned to any other dealer. These "non-designated market[s]" are areas that FCA US "would not deem it necessary to have a dealership there, or it may not be large enough in our view to sustain a dealership, but there are still pockets or areas like that that people reside, and live, and buy cars." (R.T. Vol. III, 54:21-55:6 (Tangeman).) DDI's trade zone in particular is situated adjacent to a non-designated area, which allows DDI to benefit from selling into those areas. (*Id.*) DDI is given credit towards its MSR achievement for sales in these areas without having the burden of an increased MSR objective for those non-designated areas. In fact, in California, there is a "large portion of the state that is not designated to any individual dealer that is open for dealers to sell into, and as a result of that, we perform overall at an average above 100 percent." (*Id.* at 53:19-54:6.) In other words, because not all of the geographic territory in California is assigned to FCA US dealers, and therefore not all predicted sales are assigned to all FCA US dealers' MSR responsibilities, FCA US dealers in California are collectively able to sell <u>more cars</u> than are assigned to them through the MSR calculation. Likewise, even where an area is "provisioned" to have an FCA US dealership, a dealership is not always present. These areas, referred to as "open points," benefit dealers such as DDI because the dealership is permitted to sell into these territories—which contributes to their

MSR achievement—yet any expected sales into this geography would not be added to the dealer's MSR obligation. Presently, there are open points near DDI's Trade Zone, thus benefitting DDI's ability to achieve its MSR. (R.T. Vol. IV, 226:20-227:19 (Tangeman).)

In terms of registrations, MSR looks at new vehicle registrations across California – the actual paperwork that a consumer files with the DMV to register a newly purchased vehicle. (R.T. Vol. IX, 224:21-225:14 (Frith); Ex. R302 §11(a).) This data is purchased from the state government by third party entities such as Polk or Experian, who in turn sell this data to FCA US and other manufacturers. (R.T. Vol. IX, 224:21-225:14 (Frith).) Vehicle registrations are grouped by segment, which group vehicles by particular characteristics including, but not limited to, size and vehicle type. (Ex. R422A at 004 ¶ 4, 025-026; R.T. Vol. X, 127:4-128:18 (Frith).) For example, the car segmentation profile listed on Exhibit R422A at 025 indicates that FCA US has two cars that fall within the "compact" segment—the Caliber and the Dart—meaning that the MSR requirement for the Caliber and Dart are computed by reference solely to the state-wide sales of other vehicles also falling within the compact segment. (R.T. Vol. V, 165:23-166:1 (Cholagh) ("MSR looks at average market share by segment at a state level and applies that market share locally to come up with an expected.") By excluding other vehicles outside of the segment when calculating MSR, the segment calculation "adjusts for differences from the sales localities to the comparison areas," in this case the comparison area being the State of California. (R.T. Vol. X, 14:23-15:17 (Frith).) "The segmentation idea is if you don't do segmentation, then this kind of information is hidden. You don't know that, oh, cars are more popular than trucks or vice versa." (*Id.* at 15:18-21.) The way that segmentation is applied mathematically to make this adjustment is explained below.

The calculation of a dealer's Trade Zone and Sales Locality is combined with the vehicle registration data described above to calculate a dealer's "fair share," which seeks to "assess[] the relative importance of [DDI's] immediate area of influence as compared with the [San Fernando] Sales Locality as a whole." (Ex. R302 at §11(a).) The fair share measurement is calculated such that it "accounts for our brand popularity at a trade zone or local level." (R.T. Vol. V, 27:24-25 (Cholagh).) Because the fair share is calculated at the Trade Zone level, "if a dealer is not doing well in its own area, the registration count would be lower than the industry registrations would indicate.

And so the portion of the fair share, based on the brand registrations, would be lower." (R.T. Vol. X, 41:15-21 (Frith).) In other words, an underperforming dealer would actually cause his fair share requirement to be reduced by his own poor performance.

A dealer's fair share is calculated using the Sales Locality, the Trade Zone, and the new vehicle registrations in each. First, the industry retail registrations—the total number of new vehicles sold across all vehicle brands—is measured in both the Trade Zone and Sales Locality. The registrations in the Trade Zone are then equated to a percentage of the registrations in the Sales Locality. In other words, if 10,000 new vehicles of all brands had been registered in the Sales Locality, and 2,000 of those registrations had occurred within a particular Trade Zone, that Trade Zone would have registered 20% of all brands of vehicles in that Sales Locality, which would be the Trade Zone's "share" of those registrations. (Ex. R422A at 029.) However, that Trade Zone's fair share would not be 20% – it would be further adjusted to account for the popularity (or unpopularity) of the specific brand. Continuing the example, assume that 50 of the 2,000 registrations for the Trade Zone had been of a particular brand such as Dodge or RAM, and 200 of the 10,000 registrations in the Sales Locality had also been of that same brand. (*Id.*) Applying the Trade Zone's registrations of that particular brand, 50, as a percentage of the Sales Locality's registrations of that particular brand, 200, would yield a 25% share. (*Id.*) The 25% share of the particular brand in this Trade Zone is higher than the 20% share of all vehicles of all brands in the same Trade Zone. Thus, the particular brand at issue is more popular in that Trade Zone than the performance of all brands combined within that trade zone. The Fair Share accounts for this difference in popularity by averaging the share of the individual brand in the Trade Zone (in this example, 25%) against the share of all brands in the Trade Zone (in this example, 20%). (*Id.*) Thus, in this example, the dealer located in this Trade Zone would have a Fair Share for this particular brand equal to 22.5%. (*Id.*; *see also* R.T. Vol. X, 39:11-41:9 (Frith).)

MSR is further calculated by application of certain "slants," which is a "reduction in the industry registrations based on some local market condition, like a competitive manufacturing facility that could lead to a consumer preference or bias towards another OEM's vehicle." (R.T. Vol. V, 19:1-5 (Cholagh).) FCA US employs three different types of slants: captive slants, Trade Zone slants, and local slants. An example of a captive slant would be the competitive manufacturing facility mentioned above, located near the dealer's Trade Zone but not in the Trade Zone. (*Id.*; R.T. Vol. X, 44:14-16 (Frith).) The trade zone slant is applied if the competitive manufacturing facility were actually located within the dealer's Trade Zone, and thus closer to the dealer. (R.T. Vol. V, 23:7-9 (Cholagh); R.T. Vol. X, 44:16-19 (Frith).) A local slant is applied "for things like natural disasters or construction" that would have a specific, local impact on the dealer's showroom or method of selling vehicles. (R.T. Vol. X, 37:16-20 (Frith); R.T. Vol. V, 23:9-14 (Cholagh).)[6]

Applying the above described elements is best by way of example. Looking at Exhibit R422A at 030, all of these concepts are used to calculate DDI's MSR achievement in December, 2015 for the Dart as 22.77%. Starting from the left, the column titled "Vehicle Segment" lists the vehicle segment in which the vehicle line is categorized. (R.T. Vol. X, 44:9-10 (Frith); R.T. Vol. V, 22:17-20 (Cholagh).) Here, the Dart is categorized in the compact segment. (Ex. R422A at 030.) The column titled "Product" lists the "competitive product that is contained within this vehicle segment." (R.T. Vol. V, 22:20-23 (Cholagh); R.T. Vol. X, 44:9-12 (Frith).) In this case, that product is the Dart. (Ex. R326 at 008.) The following column, titled "Ret Ind Regs," lists the total number of industry registrations for the compact segment, for the year-to-date, which occurred in the San Fernando Sales Locality: 33,570. (R.T. Vol. X, 44:12-14 (Frith); R.T. Vol. V, 22:23-23:1 (Cholagh); Ex. R422A at 030.) The use of this metric is an application of the segmentation described above. Because only registrations for vehicles falling in the compact segment are applied, this measure accounts for the popularity (or unpopularity) of compact cars within the San Fernando Sales Locality.

The next three columns list the three different types of slants described above. (R.T. Vol. V, 19:1-5, 23:2-14 (Cholagh); R.T. Vol. X, 37:7-20; 44:14-21 (Frith).) Here, the three columns list each slant as zero as none were applied. (Ex. R422A at 030.) The next column, titled "Mo In Bus.," lists

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[6] Notably, the Dealer Agreement provides a mechanism for dealers to request a slant or other adjustment to their MSR calculation. (Ex. R302 §11(a).) Cholagh testified that the Market Representation group had received such written requests from other dealers, and had applied mitigating variations in some instances. (R.T. Vol. V, 186:24-188:21 (Cholagh).) Yet DDI never requested an adjustment to its MSR requirements. (*Id.* at 190:16-19; R.T. Vol. X, 38:16-18 (Frith).)

the number of months the dealer has been in business. (R.T. Vol. V, 23:12-14 (Cholagh); R.T. Vol. X, 44:21-45:2 (Frith).) Here, DDI is listed as having conducted business for all twelve months of the year 2015. (Ex. R422A at 030.) The next column, titled "Adj Ind Reg," would reflect the adjusted number of industry registrations that would result from the application of a slant. (R.T. Vol. V, 23:15-21 (Cholagh); R.T. Vol. X, 45:3-6 (Frith).) Here, because no slant was applied, the number listed in this column remains equal to the 33,570 retail industry registrations listed in the "Ret Ind Regs" column. (Ex. R422A at 030.)

The column titled "Benchmark Standard Share" lists the "standard state share that FCA achieves within each segment" across the State of California for that vehicle line. (R.T. Vol. V, 23:22-23 (Cholagh); R.T. Vol. X, 45:6-8 (Frith).) This metric is the second aspect of the MSR calculation where segmentation is applied, and is also the metric that accounts for the popularity (or unpopularity) of the specific vehicle. Here, as to the Dodge Dart, FCA US was able to capture a market share of 1.66% for all vehicles registered in the State of California falling into the compact segment in 2015. (Ex. 422A at 030; R.T. Vol. XI, 108:23-109:2 (Frith).) By multiplying this market share percentage against the total compact car registrations in the San Fernando Sales Locality, 33,570, this segment calculation reduces DDI's sales obligation to account for the Dart's sales performance relative to other vehicles in the compact segment. (*See* R.T. Vol. V, 88:12-19 (Cholagh); R326 at 008.) Thus, this calculation reduces 33,570 total compact car registrations in the San Fernando Sales Locality to 1.66% of that total, or 557. (R.T. Vol. X, 45:10-13 (Frith); R422A at 030.) DDI's fair share is then applied to the resulting figure, further reducing this number and adjusting for any local variation in the brand's performance within DDI's Trade Zone. As described above, the column titled "Fair Share" is calculated to account for any variation in brand performance at the Trade Zone level, and thus all of the vehicle lines listed under the Dodge Car heading equal 18.09% for this metric. (Ex. R422A at 030.)

The numbers listed in the prior columns are used to calculate the figure represented in the column "Retail MSR," which lists the dealership's contractual sales obligation for the Dart for the year-to-date 2015: 101 vehicles. (Ex. R422A at 030.) This number is obtained by multiplying the adjusted industry retail registrations, 33,570, with the benchmark standard, 1.66%, or 557. The 557 figure is multiplied against DDI's fair share, 18.09%, yielding 101. (R.T. Vol. X, 45:10-13 (Frith).) The following column, "Retail Sales," represents the actual number of vehicles sold by the dealership for the year-to-date. (*Id.* at 45:14-19; R.T. Vol. V, 24:3-9 (Cholagh).) Notably, while the previous metrics discussed above are all measured at a state level, Sales Locality Level or Trade Zone level, the retail sales attributed to the dealer is applied at a national level. In other words, the dealer is given credit for vehicle sales to anyone, anywhere in the country. (R.T. Vol. V, 24:16-21 (Cholagh); R.T. Vol. III, 54:7-13 (Tangeman) ("Q: So just to clarify, when you say 'sell into,' does a dealership get credit for a sale even if that customer doesn't live in their designated area? A: Oh, yes. Q: If, for example, [DDI] were to sell a vehicle to someone living in Oregon, would they get credit for that as a sale? A: They would, yes."))

Here, DDI sold 23 Darts in the calendar year, 2015. (Ex. R422A at 030.) The final column, titled "CYTD MSR Percentage," is a comparison of the numbers listed in the two preceding columns—DDI's MSR requirement and DDI's actual retail sales—expressed as a percentage. (R.T. Vol. V, 24:23-25:2 (Cholagh).) This percentage, in turn, represents DDI's retail sales effectiveness for that particular model. (R.T. Vol. X, 51:16-52:7 (Frith); Ex. R422A at 032.) Here, DDI was expected to sell 101 Darts, but only sold 23 Darts, thus achieving only 22.77% of its MSR requirement for that vehicle line. (Ex. R422A at 030; *see also* R.T. Vol. X, 47:9-48:9 (Frith).)

2. DDI's operators have proven that they are unwilling or unable to perform to achieve their contractually defined sales obligations

Notably, DDI never disputed the way in which its MSR is calculated with FCA US:

Q You have never asked for your MSR to be adjusted, have you?
A No.
Q You have never contested with anyone at FCA the way your MSR is calculated, have you?
A Didn't know I could
Q But you haven't?
A No, I haven't.
Q You have never spoken to anyone at FCA about changing your trade zone?
A No.

(R.T. Vol. XIV, 176:12-22 (E. Sternfeld); R.T. Vol. XIII, 105:16-106:2 (J. Sternfeld); *see also* R.T. Vol. III, 48:3-6 (Tangeman); R.T. Vol. VIII, 52:8-12 (Chandler).)

Based on Frith's analysis, DDI's chronic inability to achieve its contractual MSR objectives led him to conclude that the "dealership is not achieving sales that would match up with the opportunity available to it." (R.T. Vol. IX, 228:12-15 (Frith).) As outlined in the Notice of Termination, DDI's MSR between 2011 and 2015 was not only woefully below 100%, but DDI's MSR got worse. The following is a list of DDI's average annual MSR achievement for all of the vehicle lines it has carried over the years:

Month/Year (YTD)	% MSR Attained	Sales Dealer Lost vs MSR
December 2011	72.6%	85
December 2012	53.1%	201
December 2013	46.0%	326
December 2014	60.4%	271
December 2015	63.92%	258

(*See* Exs. R326-R330.) Of course, the Dealer Agreement, Section 11(a), obligates DDI to meet its MSR objective as to "each and every model of [FCA US] vehicles" that the dealership carries. (Ex. R302 §11(a), emphasis added.) And from February 21, 2012 onward, DDI was responsible for attaining its MSR objectives for each vehicle line it offered for sale for both its Dodge and RAM franchises. (*Id.* at 038.) For both its Dodge and RAM franchises, DDI has been unable to attain its MSR requirements for the majority of the vehicles it carries under each brand for the past half-decade.

In 2011, when DDI had only its franchise for Dodge, it was able to meet its MSR requirements for only three out of the eleven vehicles carried by the dealership for which it had an MSR responsibility[7] and achieved only 72.58% of its MSR requirement for the brand overall. (Ex. R330 at 012.) In the other vehicle lines DDI carried, it fell far short of its requirements, achieving only 46.15% MSR for the Caliber, 66.67% of MSR for the Avenger, 64.86% of MSR for the Charger, 75.32% of MSR for the Challenger, 47.37% of MSR for the Caravan, 38.46% of MSR for the Journey, 41.67% of MSR for the Nitro, and 51.43% of MSR for the Durango. (*Id.*) DDI's underperformance caused a significant "net loss" to both DDI and FCA US, which represents the

[7] Although thirteen vehicles are listed on DDI's MSR Detail Report for 2011, its MSR requirement for two of those vehicles—the Viper and the Sprinter—was zero and did not count towards or against DDI's retail sales effectiveness. (*See* Ex. R330 at 012.)

amount of vehicles that DDI failed to sell in order to meet its MSR. (R.T. Vol. X, 55:11-56:2 (Frith); Ex. 422A at 035-036.) DDI's poor performance in 2011 caused a net loss to both DDI and FCA US of 85 vehicle sales. (Ex. R330 at 012.)

In 2012, the first year that DDI had responsibility for the RAM brand, it achieved its MSR requirement for only one of the RAM vehicles it carried, and indeed this was the only vehicle for which DDI was able to achieve its MSR requirement. (Ex. R329 at 012.) It failed to meet its MSR requirements for all other RAM vehicles, achieving 0% of MSR for the RAM Cargo Van and 78.43% of MSR for the Mega Cab, with an overall MSR achievement of 79.44% for RAM. (*Id.*) For its Dodge franchise, DDI did not meet its MSR responsibilities for any of the vehicles it carried. (*Id.*) Moreover, its sales for each and every Dodge vehicle DDI carried in 2012 were well below its MSR requirement, as DDI achieved only 42.42% of MSR for the Dart/Caliber, 22.22% of MSR for the Avenger, 70.59% of MSR for the Charger, 47.87% of MSR for the Challenger, 32.26% of MSR for the Caravan, 40.00% of MSR for the Journey, 66.67% of MSR for the Nitro, and 32.56% of MSR for the Durango. (*Id.*) DDI's overall achievement for its Dodge franchise was only 44.4% for the year. (*Id.*) DDI's poor performance in 2012 caused a net loss to both DDI and FCA US of 201 vehicle sales, 179 of which were Dodge and 22 of which were RAM. (*Id.*)

As with the prior year, in 2013 DDI again failed to meet its MSR requirement for every vehicle that it carried under its Dodge franchise, achieving only 36.3% of MSR in Dodge for the year. (Ex. R328 at 012.) For each Dodge vehicle, DDI's sales fell far below its contractual obligations, as DDI achieved only 39.80% of MSR for the Caliber/Dart, 34.29% of MSR for the Journey, 53.85% of MSR for the Charger, 56.32% of MSR for the Challenger, 35.56% of MSR for the Caravan, 20.00% of MSR for the Journey, and 12.82% of MSR for the Durango. (*Id.*) DDI also failed to meet its MSR obligations for its RAM franchise, achieving only 77.08% of MSR for that brand for the year. (*Id.*) DDI's overall MSR achievement reached its lowest point of this time period at only 46.03% for both Dodge and RAM. (*Id.*) DDI's poor performance in 2013 caused a net loss to both DDI and FCA US of 326 vehicle sales, 293 of which were Dodge and 33 of which were RAM. (*Id.*)

For the third year in a row, in 2014 DDI again failed to meet its MSR requirement for every vehicle that it carried under its Dodge franchise, achieving only 51.37% of MSR for the brand overall. (Ex. R327 at 012.) As with the previous year, DDI's sales fell significantly below its contractual obligations for each Dodge vehicle, as DDI achieved only 66.67% of MSR for the Dart, 40.00% of MSR for the Avenger, 65.57% of MSR for the Charger, 69.61% of MSR for the Challenger, 0% of MSR for the Viper, 42.86% of MSR for the Caravan, 27.78% of MSR for the Journey, and 31.25% of MSR for the Durango. (*Id.*) DDI again failed to meet its MSR obligations for its RAM franchise for the third year in a row, achieving only 80.66% of MSR for the brand overall. (*Id.*) DDI's overall MSR achievement for both brands continued to stagnate at a combined 60.44%. (*Id.*) DDI's poor performance in 2014 caused a net loss to both DDI and FCA US of 271 vehicle sales, 230 of which were Dodge and 41 of which were RAM. (*Id.*)

In 2015, DDI's sales continued to fall below its contractual obligations for both its RAM and Dodge franchises, ending the year at only 63.92% of MSR. (Ex. R326 at 012.) For RAM, DDI failed to meet its MSR requirements for two out of the three vehicle lines the dealership carried, achieving 82.55% of MSR for the Mega Cab and 66.67% of MSR for the Cab. (R.T. Vol. X, 49:12-50:1 (Frith); R326 at 012.) DDI fared far worse in its MSR achievement for its Dodge franchise, meeting its sales obligations for only one vehicle, the Viper, for which it was required to sell only one. (R.T. Vol. X, 48:10-19 (Frith); Ex. R326 at 012) DDI failed to meet its sales obligations for the other six vehicle lines it carried under its Dodge franchise, achieving only 22.77% of MSR for the Dart, 70.00% of MSR for the Charger, 75.21% of MSR for the Challenger, 37.50% of MSR for the Caravan, 39.39% of MSR for the Journey, and 28.95% of MSR for the Durango. (*Id.*) DDI's poor performance in 2015 caused a net loss to both DDI and FCA US of 258 vehicle sales, 247 of which were Dodge and 11 of which were RAM. (*Id.*)

As further explained below, DDI's attempts to pick and choose the lines it should be held accountable for are unavailing. This data shows that DDI failed to reach its MSR for the last half-decade for nearly all of the vehicle lines it carried for both its Dodge and RAM franchises. Such deficiencies are not minimal. As of December 2015, the net loss caused by DDI's failure to achieve its MSR requirements for the past half-decade equates to roughly 1,141 lost vehicle sales to both DDI and FCA US. (*See, e.g.* Ex. R422A at 036 (graphing DDI losses in 2015 against other FCA US dealers.)) These loses are staggering and, if DDI is not terminated, these loses will continue to grow.

That DDI has still not implemented any meaningful changes to improve its sales is underscored by the undisputed evidence that the dealership's precipitous decline has continued into 2016. (Ex. R325.) As of March, 2016, DDI's sales have fared no better than the past five years at a combined MSR achievement of 55.41% — 44.64% for Dodge Car, 52.78% for Dodge Truck, and 67.86% for RAM. (Ex. R325 at 003.) Indeed, across California, DDI is one of the very worst FCA US Dodge and RAM dealers for retail sales effectiveness. (R.T. Vol. X, 53:17-54:7 (Frith); Ex 422A at 035.) Both of the Sternfelds were clear that, if not terminated, they have no plans to improve their underperformance. This evidence confirms that DDI's sales in relation to sales in the market are exceptionally weak. Accordingly, the first factor weighs heavily in favor of termination.

3. <u>MSR accounts for local market variations</u>

The elements of the MSR calculation described above all act to account for any peculiarities in a dealer's particular Sales Locality and Trade Zone, and in so doing account for local conditions. By employing these variables, FCA US provides "adjustments for the type of vehicles that people want to buy in the area. [FCA US] . . . further adjusts for local conditions. So this is a pretty typical way of looking at expected or MSR in an area. And [FCA US] . . . actually goes a little bit farther in adjusting than many manufacturers do." (R.T. Vol. X, 50:9-18 (Frith).) To the extent that DDI argues that MSR does not account for local conditions, this argument is based primarily on DDI's failure to acknowledge the numerous variables that make up the MSR calculation which act to tailor MSR to the local market in which it is being employed.

First, DDI argues that it should not be held to the same standard as other FCA US dealers because Los Angeles is a particularly difficult area for domestic brands, and that foreign brands such as Toyota and Honda are particularly dominant in this area. As explained above, any local variance, including a preference for foreign brands, is accounted for in the formula for MSR and is reflected in DDI's MSR requirements. Moreover, DDI's argument is contradicted by, among other things, the fact that roughly "40 percent of the trade zones in LA County are above" FCA US's performance across California. (R.T. Vol. X, 211:2-12 (Frith).) LA County is also plagued with underperforming dealers, such as DDI, that hinder FCA US's registration effectiveness in that region. (*Id.* at 212:6-

12.) Likewise, LA County has much of its territory designated as "open points in the area, unrepresented territory," which provides dealers like DDI the added benefit of having more territory to sell into and more consumers to market to without adding to its MSR requirements. (*Id.*) DDI's argument is also complicated by the fact that Toyota and Honda have more dealerships in the San Fernando Sales Locality, and therefore have greater brand representation than FCA US and other manufacturers. (R.T. Vol. IX, 242:14-25 (Frith); R.T. Vol. X, 17:1-6 (Frith).)

Likewise, when compared to their performance across California, Toyota—a non-domestic brand—actually under performs in the San Fernando Sales Locality, while Ford—a domestic brand—tends to outperform in this Sales Locality relative to its overall performance in the state. (R.T. Vol. X, 19:14-19 (Frith).) Indeed, DDI's dealership is located mere miles away from one of the most prolific Ford dealerships in the world. (R.T. Vol. I, 198:8-10 (Weeks); R.T. Vol. 5, 192:22-193:15 (Cholagh); R.T. Vol. IV, 63:1-12 (Tangeman).) Other domestic dealerships within DDI's Woodland Hills Trade Zone also perform at an exceptionally high level. (R.T. Vol. V, 193:16-25 (Cholagh).) Thus, DDI's argument is belied by the fact that many FCA US dealers within Los Angeles can and do far surpass their MSR requirements, along with other domestic brands that are some of the most prolific dealerships in the world.

Second, DDI argues that its MSR requirement for the Dart should not be accounted for in its overall MSR achievement because the Dart is less popular than many of the other cars in the compact segment. This argument illustrates DDI's misunderstanding of how segments are used to adjust the calculation of DDI's MSR requirements. As explained in the example above, DDI was required to sell 101 Darts to meet its sales requirement as of December, 2015. (*See* Section IV.A.1, *supra*; Ex. R422A at 030.) A critical component in determining DDI's requirement was the application of the Benchmark Standard Share, which, as stated above, measures the state-wide market share that FCA achieves within each segment for the specific vehicle. In this instance, the Dart achieved 1.66% of the market share of all cars in the compact segment in 2015, and that share is multiplied by the total industry registrations, for the compact segment, in the San Fernando Sales Locality. By multiplying these numbers, this segment calculation reduces DDI's sales obligation to account for the Dart's sales performance relative to other vehicles in the compact segment. (*See* R.T.

Vol. V, 88:12-19 (Cholagh); Ex. R326 at 008.) DDI's fair share is then applied to the resulting figure, further adjusting for any local variation in the brand's performance within DDI's Trade Zone. Thus, DDI's MSR requirement accounts for the Dart's popularity or unpopularity, giving DDI responsibility for selling only the small 1.66% market share in the compact segment, further adjusted for DDI's fair share.

DDI may argue that other FCA US dealers are able to meet their MSR requirements for the Dart by selling at a loss, which DDI's operators are unwilling to do. However, this argument oversimplifies the issue, and ignores the fact that the FCA US dealerships who sell the Dart at promotional prices below MSRP achieve significant profits on Dart sales overall through "back-end gain": "Well, there's two different ways of looking at how a deal is booked. The front-end loss would be you're selling it for less than what you paid for it. The back-end gain would be with all the F&I services, and aftermarket stuff that you sell, you make up for the loss, and plus the VGP money you earn for selling the car." (R.T. Vol. II, 210:7-11 (Weeks); R.T. Vol. XI, 114:9-16 (Frith).) These same paths to profit available to other dealers are also available to DDI, yet DDI opts not to capitalize on them. Because of DDI's refusal to compete with its market, "on a 4-to-1 basis, consumers leave the market to purchase Darts" from other dealers located miles away and less convenient than DDI. (R.T. Vol. XI, 116:6-7 (Frith).)[8]

Moreover, while it is true that DDI performed worst relative to the Dart, it also struggled to meet its requirements for numerous other vehicles. Specifically, for year-end 2015, DDI had achieved 70.00% of MSR for the Dodge Charger, 75.21% of MSR for the Dodge Challenger, 37.50% of MSR for the Dodge Caravan, 39.39% of MSR for the Dodge Journey, and 28.95% of MSR for the Dodge Durango (Ex. R326 at 012). Indeed, while DDI's worst MSR performance in 2015 was with respect to its Dart sales, in 2012-2014 DDI performed far worse in many of the other

[8] DDI's speculation that the Dart may be taken out of production is also unavailing. DDI failed to establish the Dart would be taken out of production but, in any event, DDI is required to sell all current Dodge and RAM lines. Its assertion that it should be allowed to cherry-pick the vehicles it will sell is inaccurate. Further, the evidence established FCA US will continue to compete in the Dart's segment with the Dart or similar product and thus DDI, if not terminated, will be required to sell that product.

Dodge vehicles it carried. All of these vehicles were <u>significantly below</u> DDI's stated MSR objectives, including the Dart, and DDI's performance as to each vehicle is inadequate and in material breach of the Dealer Agreement. DDI's extreme under-performance as to the Dodge Dart is in addition to the fact that it has not met its sales responsibilities for numerous other vehicles that DDI carries for the past half-decade.

Third, DDI argues that it would be unfair to calculate its MSR for certain segments that include hybrid, electric or all-wheel drive vehicles. First, DDI is unable to point to any evidence introduced at the Hearing that would show a preference for any of these unique characteristics in DDI's sales territory. Second, DDI is incorrect, as the evidence and analysis introduced at the Hearing clearly demonstrates that either including or excluding hybrid, electric or all-wheel drive vehicles in the segments relevant to DDI would not have a statistically significant impact on DDI's MSR metrics, or that excluding these vehicles would actually cause DDI's sales effectiveness to worsen. (R.T. Vol. X, 23:16-25:3 (Frith); Ex. 422D at 422-335 – 422-336.) This confirms not only that these unique characteristics would have no impact on DDI's sales performance, but also that no such preference exists in DDI's sales territory.

Likewise, DDI may also argue that the inclusion of luxury vehicles in the segments relevant to the calculation of DDI's MSR would be unfair. However, even if all purported "luxury" brands are removed from DDI's MSR calculation, DDI remains drastically below requirements. Indeed, in a 2016 revision to the MSR calculation formula, FCA US excluded luxury vehicles from the segments used to calculate its dealers sales requirements. (R.T. Vol. VIII, 221:17-222:5 (Nevers).) These changes were "baked into the MSR report" at the time they were implemented in the beginning of 2016, and so DDI should have had the benefit of these changes at the time. (*Id.*) As is clear from DDI's actual MSR reports in 2016, their sales performance did not improve and instead worsened from the prior year. (compare Ex. R325 with Ex. R326; R.T. Vol. X, 19:21-20:1 (Frith).) Further, Frith performed the task of removing all vehicles that could be considered "luxury" from the segments relevant to DDI by taking the 2016 segmentation and applying it back to prior years. (R.T. Vol. X, 22:9-23:15 (Frith); Ex. R422D at 334.) Frith found that "there's really no change based on the segmentation change in the performance metric" for DDI, with or without "luxury" brands. (*Id.*)

Even if these competitors are excluded, DDI's performance would still be one of the worst in California.

Finally, DDI complains that its MSR performance for its RAM franchise should be graded less harshly because it was able to perform above its MSR requirement for one low volume vehicle make in 2015, the RAM Promaster, thus allowing it to achieve an overall higher MSR performance for the brand. (Ex. R326 at 12.) However, DDI does not dispute that it has failed to meet its overall MSR requirements for RAM for every single year since DDI was provided with this franchise. Moreover, DDI ignores the fact that during the same time period that it achieved 207.69% of MSR for the Promaster, for higher volume vehicles, it achieved only 82.55% of MSR for the Mega Cab and only 66.67% of MSR for the Cab, both of which constitute severe under-performance and a material breach of the Dealer Agreement. (Ex. R326 at 012; *see* Ex. R302, §11(a) (requiring that the dealer "sell aggressively and effectively at retail . . . <u>each and every model</u> of [FCA US] vehicles . . . .")(emphasis added).) Indeed, its performance in 2016 has been significantly worse, as DDI has significantly failed to meet its MSR requirements for four out of the five RAM vehicle lines carried by the dealership. (Ex. R325 at 003.) Just as DDI's under-performance in the Dart should not be excused in the analysis of the other vehicles it fails to sell, DDI's over-performance as to one or two vehicle lines should not excuse its extreme under-performance as to all the other RAM products DDI carries.

This argument is also flawed, as it does not consider the different treatment and emphasis that DDI places on individual vehicle lines that it believes are more profitable for the dealership. Walter testified that DDI tends to price its RAM vehicles closer to the prices charged by its competitors than the Dodge vehicles the dealership carries. (R.T. Vol. IX, 59:13-60:3 (Walter); Ex. R423A at 010, 015.) In other words, DDI makes less profit on its RAM vehicles than its Dodge vehicles, and these relatively low prices allow DDI to sell RAM vehicles in greater volumes. For example, Walter pointed out the significant profit made by DDI, relative to its competition, on its sales of the Challenger, Dart, Charger, and Journey—all Dodge vehicles. (R.T. Vol. IX, 55:11-59:12 (Walter).) Walter's testimony and report demonstrated that as DDI charged higher prices on its Dodge vehicles, its MSR performance as to those vehicles declined. (*Id.* at 60:14-61:18; Ex. R423A at 017.) Walter then looked at the dealership's sales of its RAM vehicles as a whole, and specifically at the RAM 1500/HD. (*Id.* at 60:4-13, 61:19-62:5 (discussing Ex. R423A at 016, 018.) Showing the same correlation between price and MSR achievement, Walter's testimony and report demonstrated that as DDI decreased the profit it made on RAM vehicles, its ability to achieve its MSR for the brand improved. (R.T. Vol. IX, 61:19-62:5 (Walter).) Walter also established DDI made the business decision to concentrate twice as much capital in its RAM inventory than in its Dodge inventory. (*Id.* at 37:21-38:10 (discussing Ex. R320 at 001).) Thus, the reason DDI experiences different results for its different model offerings is because its operators have made the business decision to focus their energies and aggressively promote certain lines but not others. More importantly, DDI's success with this one vehicle line shows that when DDI makes correct operational decisions, DDI is capable of succeeding at its location and in its facility. The success with this one vehicle line casts light on the fact that the failure as to all other lines carried by DDI results from poor operational decisions.

Similarly, while it is correct that DDI's RAM and Dodge franchises are legally separate, DDI's related argument that its ability to sell RAM vehicles should not be combined with its ability to sell Dodge vehicles is disingenuous, as DDI has acknowledged that it would not be in the public interest to terminate DDI's Dodge franchise but not its RAM franchise. Specifically, as Stockton acknowledged, no one is advocating in this case that one franchise or the other be terminated and the other left intact. (R.T. Vol. XII, 132:22-24 (Stockton).) Stockton further acknowledged that such a result would not be in the public interest. (*Id.*at 132:25-133:3.)

4. **<u>The causes for DDI's abnormally low MSR performance are varied and numerous, but all trace their origins to the business operations</u>**

The causes of DDI's poor performance are many and varied. [9] However, the analysis

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[9] DDI has attempted to blame its business failures on FCA US due to the fact that DDI's Dealer Agreement was not rejected in connection with Chrysler's 2009 bankruptcy. This argument is nonsensical for a few reasons. First, the testimony introduced at the Hearing regarding Old Chrysler's bankruptcy established that Old Chrysler chose to keep DDI's dealership because Old Chrysler needed a service point for its vehicles in DDI's sales locality in 2009. (R.T. Vol. II, 21:11-12 (Weeks); see also (R.T. Vol. III, p. 221:1-5 (Tangeman).) At that time, other old Chrysler dealerships in and around DDI's sales locality had closed their doors. (R.T. Vol II, 21:13-24 (Weeks).) If anything, this opportunity for DDI's dealership to remain open while others were closing should have given DDI a business advantage; not, as DDI argues, contributed to DDI's

conducted by Frith demonstrates that the following are <u>not</u> a cause of DDI's deficiencies: the area assigned to DDI; the benchmark used to assess DDI's performance; or any economic or market conditions of DDI's sales territory.

As to the area assigned to DDI, Frith's report and testimony at the Hearing demonstrated that: "[Trade Zone] assignment is not the cause of the poor DDI performance" (Ex. R422A at 006, ¶14, 042-045 (demonstrating that other methods of drawing DDI's Trade Zone would produce the same results); R.T. Vol. X, 61:19-65:16 (Frith); "geographic size of the [Trade Zone] is not the cause of the poor DDI performance (Ex. R422A at 007, ¶ 15, 046 (demonstrating that DDI's geographic territory is smaller than average in California and that other dealers in similar sized territories far outperform DDI); R.T. Vol. X, 65:17-67:10 (Frith)); "the number of competitive brands represented in the [Trade Zone] is not the cause of the poor DDI performance" (Ex. R422A at 007, ¶ 16, 047 (demonstrating that DDI faces only an average amount of competition and that other dealers facing similar competition far outperform DDI); R.T. Vol. X, 67:11-68:17(Frith)); "the size of [DDI's] MSR based on the [Trade Zone] is not the cause of the poor DDI performance" (Ex. R422A at 007, ¶ 17, 048 (demonstrating that DDI's MSR requirement is within average limits and that dealers with similar MSR requirements far outperform DDI); R.T. Vol. X, 68:18-69:13 (Frith)); and "[c]ustomer convenience is not the cause of the below average performance by DDI." (Ex. R422A at 007, ¶ 18, 049-050 (demonstrating that DDI is located closer to its customers than other brands in DDI's Trade Zone and Sales Locality); R.T. Vol. X, 69:14-71:14 (Frith).)

Frith's report and testimony at the Hearing also demonstrated that the benchmark employed by MSR—the performance of other FCA US dealers across the state—is reasonable. Frith demonstrated this reasonableness by comparing MSR—which uses the sales in the State of California as a benchmark—against the same calculations using the sales across the California Business Center as a benchmark and using the sales across the nation as a benchmark. Regardless of

business failings. Second, as referenced above, Old Chrysler's bankruptcy occurred in April 2009. Yet, DDI's dealership performance began its steady decline two years later in 2011. FCA US did not send DDI the Termination Notice until 2015, over five years after the bankruptcy. DDI did not offer any compelling evidence at the Hearing to explain why non-rejection of DDI's Dealer Agreement in 2009 caused DDI's business failings from 2011 to present.

what benchmark is employed, whether comparing DDI against the performance of FCA US dealers in the state, FCA US dealers in the Business Center, or FCA US dealers across the nation, DDI's sales are far outpaced by other FCA US dealers. (Ex. R422A at 008, ¶20, 052; R.T. Vol. X, 72:1-24 (Frith).)

As to the economics of DDI's market—the Woodland Hills Trade Zone—Frith concluded that "there is demand in the area for Dodge and Ram products and dealers are selling them but just not [DDI]." (R.T. Vol. X, 74:9-12 (Frith).) To demonstrate this, Frith first looked at the sales of Dodge and RAM vehicles made to consumers in the Woodland Hills Trade Zone from 2012 to 2015, and traced those sales back to either DDI or other FCA US dealerships. (Ex. R422A at 008, ¶21, 054; R.T. Vol. X, 73:4-75:4 (Frith).) Looking at these results, it is clear that "the Dodge/Ram brand performance in the Woodland Hills [Trade Zone] ([DDI's Trade Zone]) is largely due to other Dodge/Ram franchise's sales into the [Trade Zone] even though [DDI] has the geographic advantage over all other Dodge/Ram franchises." (Ex. R422A at 008, ¶21; R.T. Vol. X, 74:24-75:4 (Frith) ("So you can see the [DDI] . . . performance being a small portion . . . of the overall Dodge Ram brand performance in the area. And that's historically been the case. It's not just something that happened in 2015."). Frith created maps providing a visual depiction of these "pump-ins" demonstrating that "throughout the trade zone there are Dodge [and] Ram vehicles being registered and people are leaving the trade zone from throughout the trade zone to buy from other Dodge Ram dealers other than [DDI] at a fairly high rate . . . ." (R.T. Vol. X, 75:23-76:3 (Frith); Ex R422C at 293-295.) In other words, "there is clearly some demand and these people chose to go to a less convenient dealer to purchase their vehicle." (R.T. Vol. X, 77:10-12 (Frith).) Frith's calculations comport with the pump-in reports that DDI had access to, which show that nearly three-quarters of the Dodge and RAM vehicles purchased by Woodland Hills consumers were purchased at dealers other than DDI. (Exs. R334, R335; R.T. Vol. V, 40:22-41:1 (Cholagh).) Obviously, if other dealers are selling the vast majority of the FCA US products being purchased in DDI's own Trade Zone, DDI is not capturing the business available to it.

Further, Frith analyzed the population, households, income, and registration data of the San Fernando Sales Locality and Woodland Hills Trade Zone to determine if any unique market conditions could explain DDI's poor sales performance. (Ex. R422A at 008 ¶¶ 22-23, 055-063.) None existed. Instead, the population and household density of the area is significant and the number of consumers proximate to the dealership is likewise significant. (Ex. R422A at 055-056; R.T. Vol. X, 81:3-12 (Frith).) In fact, over the past five years of DDI's underperformance, the population of the Woodland Hills Trade Zone and San Fernando Sales Locality has been growing. (Ex. R422A at 057; R.T. Vol. X, 81:13-82:9 (Frith).) Looking at the population density as against the registrations of Dodge and RAM vehicles, Frith demonstrated that the more dense areas of DDI's territory corresponded with higher registration rates. (Ex. 422A at 064-065; R.T. Vol. X, 92:5-93:7 (Frith).) Frith also found that the average median income around DDI was adequate to support the sale of new motor vehicles. (Ex. 422A at 061-062; R.T. Vol. X, 86:8-91:23 (Frith).) In other words, the population density and income levels of DDI's Trade Zone are sufficient to support a robust sale of Dodge and RAM products, and indeed the sales in this geography are robust. (Ex 422A at 067-068; R.T. Vol. X, 93:8-94:12 (Frith).) Yet DDI is not the dealer making most of those sales.

Once the variables described above are accounted for, the etiology of DDI's failure becomes clear: the operational decisions made by DDI's owner operators have led to DDI's chronic underperformance. These shortcomings are unlikely to be remedied if DDI's business continues, as evidenced by the years of intransigence exhibited by the Sternfelds and their continued refusal to create any sort of plan to change the way they do business. (*See, e.g.* Ex. J-4_0222:8-10 (Derengowski Dep.) ("Q: Have [the Sternfeld's] discussed with you any plans for changing how the dealership's [sic] operated? A: No, sir."); R.T. Vol. XIII, 131:23-133:18 (J. Sternfeld) (acknowledging no operational changes made to the opening of FCA US dealerships Rydell or Van Nuys); R.T. Vol. XIV, 158:25-160:5 (same).) As explained by Weeks—the FCA US Area Sales Manager who has called on DDI since 2007—DDI's "stocking of inventory has pretty generally been lower than required, the advertising levels have been lower than required, and the staffing levels have been lower than required" throughout the time he has called on the dealership. (R.T. Vol. I, 55:12-14 (Weeks); *see also Id.* at 95:15-22.) Weeks' personal observation comports with Frith's and Walter's expert evaluation that:

> They tend to be higher priced. They tend to advertise less than the

> composite. They tend to have fewer salesmen. And the way it looks on here, they are expecting their salesmen to sell more than the average . . . . So it's not being competitive.

(R.T. Vol. X, 121:9-14 (Frith).) Even DDI's own expert witness acknowledged that DDI's operational decisions have impacted its ability to meet MSR. (R.T. Vol. XII, 168:13-16 (Stockton).) As concluded by Frith and Walter in their expert analyses, it is these acts and omissions of DDI's operators, explained more fully below, that are the most likely causes of their inability to achieve MSR for the past half-decade.

i. DDI has not engaged in sufficient advertising

DDI has not engaged in the vigorous and competitive advertising that is required by the Dealer Agreement. (Ex. R302, § 12.) Ed Sternfeld agreed that DDI does not use any television advertising, newspaper advertising, or billboard advertising, and has withdrawn its advertising from several magazines. (R.T. Vol. XIV, 170:11-171:21 (E. Sternfeld).) Ed Sternfeld also acknowledged that the dealership does not do any advertising in Spanish, though he admitted that "I do over half my business with Hispanic." (*Id.* at 172:7-8.) The Sternfelds both acknowledge that advertising, and especially internet advertising, creates significant benefits for the dealership. John Sternfeld agreed that the internet has changed how competition works in the automotive industry and that consumers first go online when they begin searching for a new vehicle and that the location of the dealer has become irrelevant due to consumer's heavy use of internet searches. (R.T. Vol. XIII, 103:5-13, 104:15-105:8 (J. Sternfeld).)

Yet when questioned further regarding DDI's actual efforts to increase its internet presence, Ed Sternfeld acknowledged that the size and quality of DDI's internet sales personnel was far smaller than competitive dealerships, and further acknowledged the counseling he had received from Weeks to expand his internet sales staff has been largely ignored:

> It's been an ongoing thing that we've talked about, is that many internet departments have grown up to five or six people. And I – you know, I had one person in there at one time. And getting a second person in there has been tough for me. And it's just – it is an Achilles heel for me is getting that department.

(R.T. Vol. XIV, 120:11-17 (E. Sternfeld).) DDI's lack of efforts towards advertising significantly harmed the business and is a substantial factor in explaining its poor sales performance.

DDI has clearly demonstrated that it is not willing to make the financial investment required to properly run a productive advertising operation. And DDI is particularly conservative in its investments with regards to internet advertising, which essentially represents the dealership's "new front door" in terms of reaching potential customers. (R.T. Vol. III, 73:8-16 (Tangeman).) Indeed, internet advertising is particularly important for DDI, as its internet presence would serve to overcome DDI's acknowledged shortcomings in its physical location. (*Id.* at 73:23-74:8.) Walter analyzed DDI's advertising budget in relation to its sales, confirming not only that DDI did not spend as much in advertising as other dealers, its advertising was far less than what was needed to meet its contractual sales requirements. (R.T. Vol. IX, 72:5-23 (Walter); Ex. R423A at 004, ¶ 11(g), 026.) This connection between DDI's MSR achievement and advertising budget is extremely important, as the achievement of one is necessarily dependent on the volume of the other.

> [I]n this case the key issue is what [is DDI] selling and are they selling enough to meet MSR. And so the issue is are they investing in the brand at a level of investment that would be consistent with trying to achieve MSR. So when they're advertising, are they advertising enough to bring in and meet their sales volume that would be consistent with MSR? And we see in advertising, they are not, on a relative basis, where other dealerships in both comparison groups are.

(R.T. Vol. IX, 73:17-74:1 (Walter).) Frith also analyzed evidence demonstrating that DDI's advertising expenditures fall well below other similarly situated FCA US dealers in Los Angeles. (Ex. R422A at 076; R.T. Vol. X, 119:19-120:20, 222:12-18 (Frith).)[10]

In contrast, the West Valley dealership across the street from DDI employs an entire team of advertising specialists, including a dedicated internet director. (R.T. Vol. VII, 130:25-131:13 (Van Ace) ("A: . . . . So the [Business Development Center manager] works closely with me on advertising. I have a service and parts director that works closely with me on advertising. . . . And I

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[10] Frith also found that DDI's advertising actually <u>declined</u> from 2013 to 2014, which is the time period in which the Rydell dealership re-opened. (R.T. Vol. X, 120:21-121:5 (Frith).) Frith pointed out that "the year after Rydell is in business, we see a decrease in dealership advertising . . . . So new competition in the area, less advertising. Seems a bit contrary to what I would have expected." (*Id.* at 121:1-5.) Ed Sternfeld also admitted that DDI ceased using certain advertising mediums in response to the re-opening of Rydell. (R.T. Vol. XIV, 97:12-98:5 (E. Sternfeld).)

have a general sales manager who works closely with me on advertising. . . . Q: In addition to you? A: Uh-huh – yes.")) In his assessment of DDI's digital advertising, Van Ace observed that he "would see [DDI] run ads in the paper and I feel that the newspaper for advertising in automotive is a little bit passé. Occasionally, one should do it on holiday weekends and things of that nature, but the game is digital. And I don't think that – I don't think that they were pushing the envelope there and still spending money on newspaper at the same time." (R.T. Vol. VII, 113:21-114:4 (Van Ace).) Regarding his substantial focus on internet advertising, Van Ace explained that this medium of reaching customers "is the only way that we're going to be able to garner as much business as we do and [draw] people from outside the Canoga Park are[a] to our area." (*Id.* at 131:17-22.) Van Ace invests in his dealership's advertising in an amount that is commensurate with its importance to the business, and testified that in the month of July, 2016, he invested $42,000 in advertising. (*Id.* at 210:8-11.)

DDI invests only a fraction of the amount spent by West Valley in its advertising, reporting only $211,638 in advertising costs in its 2015 financial statements, or an average of $17,636 per month. (R.T. Vol. IX, 44:23-45:4 (Walter) (referring to Ex. R320 at 2.)) Its advertising expenditures were significantly less in prior years. For example, it reported only $183,846 for the year in 2013, or an average of $15,320 per month. (Ex. R322 at 2.) This corresponds with an email sent in 2013 by Weeks noting DDI's conservative advertising, "merely spending up to the PAP spending level," or the amount that FCA US actually reimburses the dealership for. (Ex. R370; R.T. Vol. XIV, 115:14-116:5 (E. Sternfeld).) DDI reported even less on its new vehicle advertising in prior years. (*See* Ex. R422A at 076.) Indeed, the Sternfelds acknowledge that every surrounding FCA US dealer spends more on advertising than DDI. (R.T. Vol. XIII, 135:15-136:4 (J. Sternfeld).) Stockton also acknowledged the correlation between DDI's advertising practices and its ability to meet its MSR requirements. (R.T. Vol. XII, 144:5-9 (Stockton).)

DDI had been counseled for years by FCA US to increase its advertising expenditures, yet failed to make any meaningful changes in its advertising budget. DDI's operators acknowledged that its advertising expenditures are far outpaced by surrounding, competitive dealers. (R.T. Vol. XIII, 135:15-136:4 (J. Sternfeld).) Not only is DDI's failure to properly advertise its product a material breach of the Dealer Agreement, it is also a primary cause of its inability to generate business at a level anywhere near the volume of business available to it.

ii. DDI has failed to adequately maintain its facilities over time

DDI has also fallen far short in the contractually required maintenance and upgrades to its facilities, and the Sternfelds agree that their facility is dated. (R.T. Vol. XIV, 162:24-163:2 (E. Sternfeld).) The Sternfelds obligated themselves to upgrade the dealership as early as 2007 when Ed and John Sternfeld took over the business. (*See* Ex. R307 at 1 ("Management team has committed to . . . either relocation or remodel of current facility."); Ex. R308 at 2 ("Dealer has agreed to renovate the facility to Millennium design or consider relocation of the dealership to a desirable location on Topanga Canyon Blvd."); *see also* Ex. R305 at 1 (noting deficiency in total showroom dimensions and capacity).) Indeed, the Sternfelds' commitment to either relocate or remodel the dealership's facilities was part of the basis on which their dealership transfer agreement was recommended for approval by FCA US in 2007. (Ex. R308; R.T. Vol. VIII, 29:15-18 (Chandler).) The Sternfelds never honored their agreement to conduct the renovations or relocation contemplated in 2007.

DDI also failed to meet its contractual requirement to maintain current signage. DDI still had not made any renovations to its signage until well after its cure period had ended in April 2015. (*See* Ex. R360 (acknowledging new signage had not been installed as of April 27, 2015.)) Indeed, DDI's showroom façade and street-front signage looked much the same as pictures of the dealership taken many years prior. (*Compare* Ex. R419 at 001, 006; Ex. P181, tab 11 at 2-4; R.T. Vol. XII, 195:18-196:7 (Stockton); *with* Ex. R405; R.T. Vol. X, 113:5-114:13 (Frith).) This was true despite receiving $50,000 toward updating its signage. (Ex. R315.) During this time, FCA US sent DDI constant reminders that their facilities were out of date and not in keeping with FCA US's current branding. (Exs. R350, 351, 353, 354, 355, 356, 358.) Indeed, FCA US representatives tried to make personal contact with the Sternfelds regarding the necessary signage upgrades, making "numerous follow up calls and e-mails" on the issue. (Ex. R369.) Ultimately, it was not until the cure period to the Notice of Default was three days from expiring on April 27, 2015 that the Sternfelds acknowledged that they would be taking steps to renovate. (Ex. R360.) Even these renovations were not significant, as the fact that the dealership is over a half-century old is still clearly visible. (*See* R.T. Vol. I, 56:7-10

(Weeks) ("Q: How would you describe [DDI's] facility? A: Old. Q: How does it compare to the facilities of its competitors? A: Generally, smaller, and older. . . .); R.T. Vol. XIII, 127:15-23 (J. Sternfeld) (acknowledging that DDI's building is over a half century old, and that no work has been done to the showroom since the 1990s).)

Notably, the recently completed signage at DDI's facilities was designed under the "Chrysler's Group Millennium signage program." (Ex. J-4_0320:10-14 (Gifford Dep.).) This signage motif was "[l]aunched in 2010," yet it was not until 2015, five years after the new branding had been released to FCA US dealers, and on the eve of DDI's termination, and after FCA US had committed to paying $50,000 towards the upgrade, that DDI took any steps at all to update their signage. (*Id.*) Pictures of the dealership taken in 2011, for example, show that the façade to the front of the dealership was particularly outdated. (Ex. 419 at 006) In 2012, Tangeman visited the facility and found it "to be very substandard for what we would expect for a dealership. Old, unkempt in a lot of ways." (R.T. Vol. II, 234:12-23 (Tangeman); *see also* R.T. Vol. III, 29:4-16 (Tangeman) ("Only recently has he completed the facia, the view of the front of the store, where the arch was installed and our proper brand signs.")) Indeed, Tangeman's observation of DDI's facilities in 2012 matched with his perception of pictures of the dealership taken decades ago. (R.T. Vol. III, 32:23-35:11 (Tangeman).) Moreover, "[f]or a number of years, our Ram wasn't even properly identified on the front of the building." (*Id.* at 29:4-16; *see also* Ex. 419 at 8 (noting, among other things, "Ram vehicle not present in showroom.")) DDI's own expert witness, Stockton, disparaged DDI's facilities and location in his expert report. (*See* Ex P181 at ¶¶ 35, 38, 41 (describing the dealership as "land-locked in a space-constrained manner" that "diminishes [DDI's] sales of new vehicles—particularly Dodge vehicles."); R.T. Vol. XII, 130:16-22, 135:1-10 (Stockton).) The Sternfelds acknowledged that the inside of DDI's showroom and sales waiting area had not been renovated since around the first Gulf War in the 1990s. (R.T. Vol. XIII, 127:21-128:8 (J. Sternfeld); R.T. Vol. XIV, 162:11-13 (E. Sternfeld).)

In an attempt to explain the many years that DDI refused to perform upgrades to the facilities, DDI cites to permitting issues as the cause of their delay, and specifically that certain ADA requirements had to be met before the relevant permits could be issued to complete any upgrade to the exterior signage. As an initial matter, as stated above, the Sternfeld's representation that they would renovate the dealership came in 2007 and was a significant consideration in approving the transfer of the franchise agreement to the Sternfelds from their father. They never complied with that agreement. Further, the documentary evidence received by the Los Angeles Department of Building and Safety (the "LADBS"), shows that DDI did not even begin the permit application process for the minimal and insufficient renovations they did do until August 13, 2013. (Ex. R420 at 001, 003, 005, 007, 009.) Alex Sbardellati, the LADBS representative responsible for approving the permits relating to DDI's exterior signage upgrades, testified that "the disabled access [approvals] is not going to look at signage because signage is not related to disabled access." (Ex. J-4_0470:1-3 (Sbardellati Dep.); *id.* at J-4_0470:21-24 (reviewing Ex. R420 at 3: "If you go down to clearance information, there's no DAS [disabled access] clearance. There's no DAS clearance there because disabled access is not required for signage."); *id.* at J-4_0481:4-5 (same); *id.* at J-4_0484:11-14 (same).) In other words, DDI's explanation that the City caused DDI's delay is not accurate. Sbardellati testified that DDI, not the LADBS, caused much of the delay in the permitting process. (*See, e.g.* Ex. J-4_0455:23-J-4_0456:7 (Sbardellati Dep.) (Q: So what was happening between January 27th, 2014 and May 29th, 2014? A: Still addressing the corrections. Q: So was there anything that they needed from your office between that – in that time period? A: No."); *id.* at J-4_0457:22-J-4_0458:3 ("Q: What did [DDI] need to do with your department between May 29th and December 31st? A: Nothing. Plan check was approved. The permit's not issued yet. What that means is it's in ready to issue status. So, as you said before, the ball's in their court to come in and pull the permit.")

In stark contrast, DDI's neighboring FCA US dealership, West Valley, initiated its plans to fully remodel its facilities after only a few months in operation. (*See* R.T. Vol. VII, 12:1-21 (Nouri).) Describing the purpose behind his haste in remodeling, Nouri pointed out that "there's the statistics out there that, nationally, when Chrysler dealer have remodeled and totally revamped their place, their business goes up 60 percent." (*Id.* at 12:17-21.) Van Ace confirmed that the dealership has invested in new phones and computer systems and that a more fulsome renovation of the dealership is underway. (R.T. Vol. VII, 128:19-129:10 (Van Ace).) Further, West Valley has increased its effective storage and vehicle inventory capacity by renting storage space, which would be equally accessible to DDI. (*Id.* at 139:1-12.). Despite the limited capacity of its lot, DDI does not use this storage space for additional vehicle inventory. (R.T. Vol. VIII, 153:19-154:3 (Nevers).)

Incredibly, as long back as 1993, the senior Ed Sternfeld acknowledged that DDI's facilities were old and in constant need of repair. (Ex. R303 at 002 (noting the "age of this facility").) At the end, it took FCA US nearly a decade to compel DDI to do any renovation and, even then, it was nowhere near the level needed or contemplated by the 2007 agreement. Rest assured that any future renovations would be equally burdensome to achieve. And further renovations are currently necessary, as those aspects of the facility that were not remodeled continue to be inadequate. (R.T. Vol. III, 30:6-17 (Tangeman) ("The showroom is still very small, very outdated. When you just walk into the building, it's like you're going back in time 20 years. It's – Again, it's certainly not in line with what we would expect a facility to be with the type of product that we're putting out there today and the transaction price customers are dealing with products today."); R.T. Vol. VIII 152:25-153:4 (Nevers) (same).) DDI has not fulfilled its contractual obligations to maintain its facilities, putting FCA US at a "competitive disadvantage" to other manufacturers represented in this area, and this failing bears a direct correlation to its inadequate performance overall. (R.T. Vol. III, 30:18-31:5, 102:25-103:8 (Tangeman).)

iii. DDI has failed to hire a sufficient number of qualified personnel and provide adequate training

DDI has also fallen far short of its contractual requirement to hire a sufficient number of qualified personnel. In his analysis, Walter found that DDI employs fewer sales people than other similarly situated FCA US dealers. (R.T. Vol. IX, 75:1-76:20 (Walter), Ex. 423A at 004 ¶11(h), 028-029.) Compounding this shortcoming, Walter further found that DDI's sales people, on average, sold fewer cars than the sales people at other similarly situated FCA US dealers. (R.T. Vol. IX, 74:8-25 (Walter); Ex. 423a at 003 ¶ 11(h), 027.) In other words, not only does DDI have fewer sales people than other FCA dealers, the sales people it does employ are less productive, and these inadequacies necessarily impact DDI's inability to meet its contractual sales obligations and to service DDI's customers. (R.T. Vol. IX ,76:5-20 (Walter).) The poor performance of DDI's sales staff is conspicuous when reviewed in connection with the compensation these individuals receive. Walter's review of DDI's financial statements confirms that its sales staff is paid far less than the sales personnel at comparable FCA US dealers. (R.T. Vol. IX, 45:22-46:4 (Walter); Ex. 423A at 030.) Looking at this combination of negative factors, Walter indicated his concern that DDI's sales people were "selling fewer units, there are fewer of them, and they're making less" which would suggest that, in order to improve, DDI would need "a different quality of salespeople that are more effective and have the compensation to support those effective salespeople." (R.T. Vol. IX, 77:12-19 (Walter).) Indeed, as shown in Attachment 25 to Walter's report, DDI's sales people appeared to be making less than $25,000 per year in 2011 and 2012. (Ex. R423A at 030.)

DDI's own employees acknowledge that DDI's chronic understaffing has had an impact on the business. Vicki Derengowski, DDI's office manager, testified that "right now we're real shorthanded" when asked about her department. (Ex. J-4_0200:11-12 (Derengowski Dep.).) Ed Sternfeld acknowledged that the dealership presently is under-staffed in its service department. (R.T. Vol. XIII, 270:2-5 (E. Sternfeld).) Likewise, John Sternfeld acknowledged the numerous employees that have passed through all departments at the dealership in the past years. (R.T. Vol. XIII, 88:6-92:15 (J. Sternfeld).) As to the sales department, Ms. Derengowski testified that a common reason that sales persons leave DDI is "[b]ecause they're not making enough money." (Ex. J-4_0217:4-6 (Derengowski Dep.).) This would comport with the Sternfelds' explanation contained in their April 27, 2015 letter that their personnel levels are constantly inadequate because "our local competitors continuously pursue our employees." (Ex. R360.) Given that DDI's sales staff makes less money on average than surrounding dealers, it would make sense that they would tend to leave DDI to go work for other, surrounding dealers. (R.T. Vol. IX, 45:22-46:4 (Walter); Ex. 423A at 030.) Indeed, DDI's pay plans for its sales personnel indicate that they would be paid minimum wage when they are unable to meet their commission based pay goals. (Ex. R430 at 001-004; R.T. Vol. XIII, 205:7-13 (E. Sternfeld).) DDI's internet sales manager, for example, acknowledged that his compensation is "straight commission," and that he would not "make a penny until [selling] a car." (R.T. Vol. VI, 17:7-12 (Jonas).)

This testimony from DDI's own employees corresponds with the urging DDI received from

FCA US to increase its staffing, including an action plan given by FCA US to DDI in 2012, encouraging Ed Sternfeld to hire one to two additional sales people and one individual responsible for finance and insurance. (Ex. R348 at 004.) Likewise, at one point, DDI was put on probation with the Business Link program with FCA US for, among other things, failing to employ an outside sales consultant for the program and to have a Business Link manager on staff. (Ex. R312.) Ed Sternfeld also acknowledged that he was counseled by Weeks to employ a new sales manager, but that they "never found one." (R.T. Vol. XIV, 199:14-25 (E. Sternfeld).) Regarding DDI's current sales manager, as observed by Weeks, "if the dealership is serious about hitting its numbers, he would need to be replaced" as Attia is merely "serviceable, but not the guy who is needed to get them to the higher level." (R.T. Vol. I, 140:24-141:14 (Weeks).)

Testimony and evidence was also introduced at the Hearing showing that DDI's operators had an exceptionally low level of oversight regarding their employees' training and have fallen far short of their contractual obligations in the Dealer Agreement. (*See, e.g.* R.T. Vol. XIII, 71:5-72:3 (J. Sternfeld).) Attia, DDI's sales manager, acknowledged that he was not provided with any training when he started working at the dealership; that in the four years he has worked at DDI, he has never "undergone any training hosted in house," but has only attended training hosted by FCA US. (Ex. J-4_0011:5-7, J-4_011:24-J-4_0012:5 (Attia Dep.); *see also* Ex. J-4_0613:16-22 (Taylor Dep.).) Ed Sternfeld agreed that DDI does not do any in-house training for its managers. (R.T. Vol. XIV, 153:8-10 (E. Sternfeld).) DDI's inadequate oversight of its employees training was recorded by FCA US, which in turn notified DDI of the deficiency and urged the dealership to improve. (Ex. R378; R.T. Vol. I, 112:22-24 (Weeks).)

DDI's lack of properly trained and adequate personnel is particularly notable as to its internet sales, which until a few months ago was run by an individual who admitted to being "too green in the industry to be given any responsibilities or duties," having had no experience as an internet manager prior to being hired by DDI. (R.T. Vol. VI, 9:2-11, 10:7-19 (Jonas).) As explained above, the need for DDI to expand its internet presence is paramount to its ability to capture the sales available to it in DDI's assigned territory. (*See* Section IV.A.4.i, *supra*.) Yet DDI made the business decision to hire Hennessy Jonas in May, 2016, to replace its former internet manager, Steve Nichols, despite the Sternfelds' understanding that Jonas had no prior experience as an internet manager. (R.T. Vol. XIII, 99:22-25 (J. Sternfeld).) Although Nichols eventually returned, he is unreliable and has left the dealership numerous times. During the times that Nichols is absent, DDI leaves Jonas in charge of internet sales at the dealership, and he continues to make up half of DDI's current work force for internet sales. In addition to being inexperienced, Jonas' employment with DDI as internet sales manager is also suspect given his significant criminal background (R.T. Vol. VI, 19:13-15, 24:3-22 (Jonas)) and history of civil litigation filed against him. (*Id.* at 25:2-6, 25:21-26:2, 27:3-5.) Jonas' lack of experience is evident in the results he has achieved at the dealership, as Jonas acknowledged that he had not "done anything to improve sales at [DDI]." (*Id.* at 14:17-15:7 ("A: Have I changed anything? I'm going with the flow. I haven't changed anything, if that's what you're asking. Q: So you haven't implemented any new plans or operational processes to improve the department that you run? A: No, sir. If it ain't broke, don't fix it.") Clearly this is not the type of vigorous, skilled sales personnel that DDI would need to improve its performance.

DDI's practices with respect to its personnel have contributed greatly to its inability to achieve MSR, and is likewise one of the primary causes for DDI's inability to capture the business available to it.

iv. DDI does not carry sufficient inventory

DDI acknowledges that at least one potential cause of its consistent sales shortfalls is a lack of sufficient inventory. Notably, Ed Sternfeld agreed that there are times when, on a monthly basis, the dealership has not carried enough inventory to meet its MSR. (R.T. Vol. XIV, 173:5-8 (E. Sternfeld).) This acknowledgement is echoed by FCA US representatives, based on their experienced understanding that "if a dealership stocks an appropriate number of vehicles, it's helpful to be able to achieve their MSR. If they're refusing to stock by vehicle line – certain vehicles, then it's difficult for them to achieve what their contractual requirement is. (R.T. Vol. VIII, 83:11-14 (Chandler).). R.T. Vol. III, 74:25-75:4 (Tangeman) ("A lot of the basis in the meetings that we had with [DDI] were if you're going to be serious, and want to improve your sales, and you're going to take a genuine effort to try to make this work, the first step is loading the pipeline with more inventory, and it's my understanding that that never took place."); R.T. Vol. III, 96:19-97:4

(Tangeman) (referring to Ex. R348 at 003.); R.T. Vol. I, 106:2-13 (Weeks) (acknowledging that Weeks had counseled the dealership to increase its inventory going back to July, 2012.))

In fact, DDI frequently declined to order much of the inventory that was "allocated" to it by FCA US on a monthly basis. (R.T. Vol. I, 100:6-11 (Weeks) ("Q: At times, would [DDI] pass on it's [sic] allocation, or in other words, not order it's [sic] full allocation? A: Yes. Q: How often? A: A fairly regular basis. They would never—usually not take it all.")) Ed Sternfeld admitted that DDI would not order its full allocation "[m]any times" from 2013 to 2015. (R.T. Vol. XIV, 11:4-10, 164:24-165:12 (E. Sternfeld).) Likewise, Walter demonstrated that DDI's insufficient inventory is particularly prevalent with respect to Dodge. As of 2015, DDI reported an inventory consisting of $3.3 million in trucks yet only $1.4 million in cars, indicating that DDI has made the business decision to focus its inventory capital towards the sale of RAM vehicles at a factor of more than two to one. (R.T. Vol. IX, 37:21-38:10 (Walter) (discussing Ex. R320 at 001).) Mr. Weeks' testimony demonstrated that DDI's books and records comport with Walter's assessment and that in 2015, for example, the dealership stocked about half as many vehicles as it would have needed to meet its MSR requirement. (R.T. Vol. I, 95:24-99:17 (Weeks) (reviewing Exs. R326 at 012, 320 at 001.)

Walter further explained that DDI's inventory as to both its Dodge and RAM brands is also lacking because of DDI's practice of "trading out" its inventory to other dealers. (R.T. Vol. IX, 62:6-66:13 (Walter).) Walter calculated that, on a cumulative basis from 2013, DDI has "traded out a net 30 units" of its Dodge inventory and "traded out approximately 32 units of its RAM brand, effectively lowering its inventory for both. (*Id.* at 65:10-21, 66:10-13 (discussing Ex. R423A at 019-020).) DDI's effective reduction of its inventory for both brands shows that "over time… [DDI] consistently operated as a net trade-out dealer, cumulatively giving away what I would think to be critical inventory for purposes of meeting MSR." (*Id.* at 65:17-21.) Walter thus concluded that

> [DDI] could earn more product by selling more. But instead of selling it, they're trading it out. And if they trade it out, they don't earn more. And so it becomes a cycle that they lose that opportunity to build enough inventory over time based on building their sales. So they're maintaining inventory at their level of sales. Unfortunately, their level of sales is not adequate for purposes of MSR.

(*Id.*at 66:21-67:3.) As demonstrated by Walter, DDI's trade-out practices have a direct impact, which has grown over time, on the total amount of inventory the dealership is able to maintain. (*Id.* at 67:4-68:7 (discussing Ex. R423 at 021-022).)

Testimony given by Barbara Johnson of Wells Fargo Dealer Services—DDI's lender for its floor plan financing—confirms that DDI has made the business decision to starve the business of the financing that would be necessary to provide the amount and diversity of inventory required to satisfy consumer demand. Ms. Johnson—the "[r]elationship manager" at Wells Fargo responsible for DDI's account—acknowledged that DDI could "[a]bsolutely" increase their inventory financing if it so desired. Ex. J-4_0348:7-14 (Johnson Dep.), J-4_0356:5-8 (same), J-4_0358:7-13 (same).)

In fact, DDI's own actions confirm that it typically operates at an inventory level below what would be necessary to maintain adequate sales figures. Specifically, as of August 22, 2016 when Johnson gave her deposition in this litigation, DDI had $5.8 million in new vehicle inventory on its lot, which was 124% of its then-current loan commitment from Wells Fargo Dealer Services of $4.75 million. (Ex. J-4_0377:2-9 (Johnson Dep.) (DDI is "over line right now" with "$5.8 in new" vehicle inventory), J-4_0381:3-5 (Johnson Dep.) (acknowledging "net outstandings are 124 percent of what the commitment is")). By contrast, a review of DDI's financial statements from the prior year reveals that the dealership carried around $1 million less in inventory at year end, 2015—only $4,756,046. (Ex. R.320 at 1.) Looking back to 2013, this number drops precipitously, as DDI's financial statement reveals that the dealership had only $2,916,725 in inventory as of December, 2013. (Ex. R322 at 1.) While DDI's oversubscription of its floor plan financing around the time of the market drive was likely an effort to mask its true condition, it also indicates DDI's understanding that it would need far more inventory on a regular basis to maintain the sales volume available to it in the Canoga Park community. DDI's failure to maintain an adequate inventory is a significant contributor to the poor sales the business has experienced over the past half-decade.

DDI's inability to consistently stock sufficient inventory is a central cause of its chronic inability to capture the business available to it, to meet its contractual obligations to FCA US and to properly serve its community and customers.

5. **<u>DDI's purported explanations for its poor performance are unavailing</u>**

As explained immediately above, numerous aspects of the Sternfelds' choices in operating the business have contributed to DDI's poor performance over the past five years. Yet, oddly, DDI seeks to argue that these actions of DDI's operators are the very reasons that their performance should be graded less harshly. DDI's argument neglects to acknowledge that each and every factor addressed above—the dealership's lack of advertising, lack of inventory, location in a non-competitive geography, pricing practices, outdated facilities, and inability to retain qualified personnel—are all within DDI's control and, indeed, are obligations DDI owes to FCA US and DDI's customers. DDI is responsible for each of these shortcomings under the Dealer Agreement. (*See* Ex. R302, §§ 11(d)(i) (stating DDI's obligations to ensure the quality of its facilities), 11(f) (stating DDI's obligations to ensure the quality of its personnel), 11(g) (stating DDI's obligations to maintain brand signs), 12 (stating DDI's obligations as to advertising)). DDI's attempt to recast its own shortcomings as excuses for why its inadequate sales performance should be overlooked is unavailing. Each of these excuses actually provides additional support for termination under the remaining statutory factors, as discussed below.

DDI also lists other causes for its poor sales performance that are similarly ineffective: that it is unable to obtain MSR because it does not have franchises for all four of the FCA US brands; that it is located in an economically depressed part of the Woodland Hills Trade Zone; and that its sales would actually be considered strong when accounting for the sale of parts. As explained below, these arguments fail.

i. DDI made the business decision to forego the opportunity to purchase the Jeep and Chrysler brands

DDI contends that its overall performance is weak because it does not hold the Jeep and Chrysler brands. However, this argument, as with others, ignores the fact that DDI consciously made this business decision. (*See* R.T. Vol. IV, at 13:13-19 (Tangeman) ("Q: All right. Was there ever an opportunity when the Chrysler and Jeep brands or franchises were available to the Sternfelds that you're aware of? A: Yes. Q: When was that? A: Any time that they may choose to go after them.") In the time that the Sternfelds were the principals of DDI, the Sternfelds did not request from FCA US that they be given franchises for Jeep or Chrysler. (R.T. Vol. III,. 129:8-19 (Tangeman); R.T.

Vol. VIII, 65:19-24 (Chandler); R.T. Vol. VIII, 166:23-167:3 (Nevers); R.T. Vol. XIII, 141:7-20 (J. Sternfeld).) Notably, DDI was offered an opportunity to purchase West Valley. Nouri testified at the Hearing that, shortly after his purchase of West Valley Chrysler Jeep in November, 2015, he contacted the Sternfelds and asked for a private meeting in their office. (R.T. Vol. VII, 12:22-14:24 (Nouri); *see also* R.T. Vol. VII, 106:8-17 (Van Ace).) At this meeting, Nouri testified that he "said, 'I'm here for a simple reason. My wish is, if you be kind enough to sell me your dealership. And if you don't, I would gladly sell you mine.'" (R.T. Vol. VII, 13:23-14:3 (Nouri).) As Nouri testified, the Sternfelds' response to his proposal was negative: "[t]he bottom line was they were not interested to buy or sell." (*Id.* at 14:23-15:4.) Ed Sternfeld acknowledged that they refused Nouri's offer again when Nouri asked the Sternfelds again ten days later. (R.T. Vol. XIV, 198:17-20 (E. Sternfeld).) Had DDI accepted this offer and consummated this purchase, DDI would have the Jeep and Chrysler brands that it complains it is lacking. DDI made the decision to forego this business opportunity, and should not be permitted to use its own business decision to excuse its breaches of the Dealership Agreements.

While DDI may argue that FCA US would not have permitted DDI to purchase the Jeep and Chrysler franchises, this argument is belied by the testimony of FCA US's representatives. For example, Steve Corle, the former dealer network manager for the California Business Center, testified that he was "sure I probably did" have discussions with the Chrysler Jeep dealership in Canoga Park about selling those franchises to DDI. (Ex. J-4_0143:14-21 (Corle Dep.); *see also Id.* at J-4-0144:3-8 ("Q: As far as you were concerned it would have been fine to have one [Canoga Park dealer] to buy out the other, you didn't have a preference for one over the other? A: My recollection at that time in that 2010-2011 era was [DDI and the Chrysler Jeep dealership] were both about the same performance, so, no, I didn't have a preference.")) Ms. Gifford similarly testified that, in her former role as Dealer Network Manager for FCA US "[t]here were discussions of bringing Sternfeld and Ellis together to potentially consolidate" through a buy/sell, and that FCA US would ask the Sternfelds "Have you had a discussion with Mr. Ellis?" and "How did that conversation go?" (Ex. J-4_0306:9-23 (Gifford Dep.).) Weeks similarly agreed that there was nothing "that prevented [DDI] from going after the acquisition of the other two brands from the facing dealer[.]" (R.T. Vol. II, 201:4-8 (Weeks).)

Tangeman echoed the testimony of numerous other FCA US witnesses, confirming that DDI did not take any actions to purchase Chrysler or Jeep franchises and that DDI could have pursued the acquisition of these franchises if it had so chosen. (R.T. Vol. III, 129:8-19, 130:2-23 (Tangeman) ("I am not aware of any approach to [FCA US] for [DDI] to purchase – for [DDI] to purchase the Chrysler and Jeep franchises in that time period" between 2011 and prior to the time of termination), 131:6-22.) Indeed, Tangeman clearly indicated that DDI could have purchased the Jeep and Chrysler franchises at "[a]ny time that they may choose to go after them." (R.T. Vol. IV, 13:13-19 (Tangeman).) This fact is particularly relevant, given that Tangeman held the role of Dealer Network Placement Manager for the California Business Center at the time Nouri made the offer to sell West Valley to DDI in November, 2015. (R.T. Vol. II, 228:6-229:23 (Tangeman).) Likewise, Nevers indicated that, if he had been in his current role—Dealer Placement Manager for the California Business Center—prior to the decision to terminate, he may have approved DDI's purchase of the West Valley franchises given the correct proposal. (R.T. Vol. VIII, 172:13-173:3 (Nevers).)[11] Though DDI may seek to argue that Nevers' would not presently approve a buy/sell between DDI and West Valley, "all of his answers [are] after the fact, after the notice of termination," and thus have no relationship to DDI's ability to accept Nouri's offer to sell the Chrysler and Jeep franchises before the decision was made to terminate DDI's franchises. (R.T. Vol. VIII, 204:10-13 (Nevers) (statement by ALJ Pipkin)).[12] In any event, the conversation is nothing more than hypothetical as the

[11] Nevers worked in the Denver Business Center at the time that the decision was made to terminate DDI's franchise in November, 2015, and therefore had no role in the decision and likewise had no responsibility for the California Business Center generally. (R.T. Vol. VIII, 150:7-22 (Nevers).)

[12] Although DDI contends that FCA US would not have permitted DDI to purchase Jeep and Chrysler franchises, DDI asserts that a clandestine negotiation was made with Nouri to allow him to purchase DDI's franchises on condition that he move the combined entity to the auto row in Woodland Hills. This conspiracy theory was thoroughly dispelled by the unequivocal testimony of FCA US representatives. Tangeman specifically "advised Nouri that to my understanding Sternfeld was not a willing seller." (Tangeman Test., Tr. Vol. III at 224:11-12.) Nevers likewise confirmed he had never suggested to Bob Nouri that the Dodge and RAM lines would be available at any point. (Nevers Test., Tr. Vol. VIII at 176:6-24.) Nouri also testified that he initiated contact with the Sternfelds, not FCA US. (Nouri Test., Tr. Vol VII at 62:22-63:7.)

Sternfelds admitted they never attempted to purchase the Chrysler or Jeep lines at any time after taking control of the dealership in 2007. (R.T. Vol. XIII, 141:7-20 (J. Sternfeld).)

Moreover, merely adding additional brands to DDI's offering would not necessarily equate to better performance. DDI's MSR requirements are only set for Dodge and RAM, and are specific for each line of vehicle sold by the dealership. If DDI obtained the Jeep and Chrysler franchises, their sales requirements would necessarily increase to account for the additional brands, and DDI would find itself responsible for selling dozens of additional vehicles each month over what it is able to sell presently. (*See* R.T. Vol. XI, 79:16-80:8 (Frith).) Further, as numerous FCA US employees testified, a dealership cannot improve its sales by obtaining additional franchises unless it makes significant operational changes to account for its corresponding increase in sales responsibility. For example, when asked whether he was aware of any reason that adding "additional brands would not result in an increase in sales," Steve Corle, the former dealer network manager for California, explained that "[i]f a dealer doesn't change his business practices, adding the additional line will not increase sales." (Ex. J-4_0138:5-13 (Corle Dep.).) DDI's argument that additional brands would lead to additional MSR achievement also pre-supposes that the added brands would perform stronger than DDI's existing Dodge and RAM brands. However, as Nouri testified of his West Valley Chrysler Jeep dealership, "Chrysler is almost nonexistent. To put it in perspective, my [West Valley] location will sell 235 cars. I will probably end up selling ten Chryslers, brand new ones." (R.T. Vol. VII, 48:12-24 (Nouri).) DDI has proven that it is unable or unwilling to aggressively market certain cars, such as the Dodge Dart. It is likely that DDI would face the same issues with the Chrysler brand, and further face the same underperformance.

Adding additional brands to a dealership also adds logistical issues that a dealer must adapt to in order to succeed, as "[i]t is difficult to stock a full line of 27, 28 different models. So you have to have a place to park those vehicles and store those vehicles. It's difficult to keep your salespeople trained and you service people trained on that wide [a] range of product." (Ex. J-4_0169:21-70:1 (Corle Dep.).) This would be physically impracticable for DDI to achieve, as its undersized facility would not permit the display of additional product, nor would its office space permit the addition of the personnel required to meet the increased sales demands of two addition franchises. (R.T. Vol. II, 205:5-10 (Weeks) ("Q: Does [DDI] have additional—any additional room on it's [sic] outside display lot for any additional product currently? A: In my view, no. Q: Does [DDI's] facility have any additional office space for additional personnel? A: No.")); R.T. Vol. III, 134:12-18 (Tangeman) ("In my professional opinion, if we're working out of the same facility, on the same lot, the same size, then in my opinion, you're trying to move more vehicles through there. And I'm not going to say there wouldn't be some incremental increase, but my professional opinion, there would be substitution. They would be selling some Jeep's [sic], some Chrysler's [sic], some Dodge's [sic], some Rams, but not a significant number of vehicles."))

Regardless of whether DDI had purchased Chrysler and Jeep franchises when it had the opportunity, it would almost certainly remain one of the least productive dealerships in California.

ii. DDI made the business decision to remain in Canoga Park

DDI also contends that it could not meet its sales obligation because the Canoga Park area is economically depressed and is not capable of sustaining high sales volume. The parties are in agreement that Canoga Park is not the ideal location for DDI. (*See, e.g.* R.T. Vol. I, 55:23-56:3 (Weeks) (describing Canoga Park as "a tougher part of town. It's in the San Fernando Valley. A lot of Section 8 type housing. A lot of day laborers along the street. There are some nice areas around there, but in view of where the other dealerships are, it's a tough location."); R.T. Vol. X, 84:22-85:14 (Frith) (same); Ex. P181 at ¶¶ 8, 31 (describing DDI's location as "an economically depressed market" and that the "area surrounding [DDI] reflects the effects of this decline"); R.T. Vol. XII, 131:14-132:5, 133:22-134:13 (Stockton) (same); R.T. Vol. XIII, 111:24-112:2 (J. Sternfeld); R.T. Vol. XIII, 222:12-25 (E. Sternfeld).) Ed Sternfeld acknowledged that there was gang-related crime and violence in the area, R.T. Vol. XIV, 143:1-144:14 (E. Sternfeld), and Stockton commented on the "420 Nurses" selling marijuana nearby. (R.T. Vol. XII, 54:12-23 (Stockton).) At one point, the Canoga Park area contained numerous new vehicle dealerships. (R.T. Vol. X, 6:3-24, 7:13-18, 8:3-11 (Frith).) As the Canoga Park area changed and declined, these dealerships left the area, and DDI and the West Valley dealership are the only new vehicle dealerships that remain. (*Id.*; Ex. R422C at 290; R.T. Vol XIV, 168:13-169:2 (E. Sternfeld).) The testimony and documents introduced at the Hearing were universally consistent—FCA US preferred the dealership to be located in Woodland

Hills. However, again, the location of the dealership was DDI's business decision to make.

As an initial matter, DDI's decision to remain in its current location in Canoga Park is a business decision that resides entirely with DDI, not FCA US. The Dealer Agreements require only that DDI seek permission from FCA US prior to relocating, (Ex. R302 § 11(d)(ii)), yet DDI has not made any request to FCA US for such relocation. (R.T. Vol. XIV, 167:7-168:7 (E. Sternfeld); R.T. Vol. III, 23:1-5 (Tangeman); R.T. Vol. VIII, 53:22-24, 163:5-10 (Chandler).) FCA US has previously advised DDI's owners of this fact, and of the benefits that would inure to both FCA US and DDI if DDI made the necessary investment required to relocate its dealership. However, while FCA US "has advised that that's an ideal location for us to establish, . . . we can't force or mandate a dealer to relocate to that location." (Ex. J-4_0302:10-12 (Gifford Dep.); R.T. Vol. II, 207:8-11 (Weeks) (same).) Indeed, the Sternfelds acknowledged that they considered making the move to a more profitable location, but they ultimately rejected that option because "without having both sides of it, no one – you couldn't even consider moving." (R.T. Vol. XIV, 167:19-25 (E. Sternfeld).) The Sternfelds are also reluctant to move the dealership because DDI pays rent to the Sternfelds, who own the property through a separate entity. (R.T. Vol. XIV, 198:21-199:2 (E. Sternfeld).) DDI agreed to either relocate the dealership or remodel in 2007. It did neither. DDI cannot point to its own business decisions as an excuse for its inadequate performance.[13]

Moreover, the evidence introduced at the Hearing indicates that DDI's sales territory is amply capable of supporting the volume of sales necessary for DDI to succeed. (R.T. Vol. I, 203:8-10 (Weeks) ("ADMINISTRATIVE LAW JUDGE PIPKIN: Do you think the Canoga Park location precludes dealers from conducting satisfactory sales? THE WITNESS: No.")). As explained above, Frith analyzed the population density, household density, income levels, and registration data to determine if any unique market conditions could explain DDI's poor sales performance. None

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[13] DDI's argument further lacks credibility as the evidence at the Hearing established that most of the changes to the market complained of by DDI occurred decades prior. Indeed, DDI sent a letter in 1993 explaining many of the same complaints about the area that it is still making 23 years later. (Ex. R303.) Both Sternfelds also testified that many years have passed since the other dealerships and industry left the area. Despite this extended period of time that has expired, the Sternfelds made no effort to move their dealership to a more desirable location.

existed. Instead, Frith concluded that the population and household density of the area is significant and that the number of consumers proximate to the dealership is likewise significant, and further that this population has a sufficient median income to support the sale of new motor vehicles. (*See* Section IV.A.4., *supra.*) Likewise, the prevailing economic conditions in Canoga Park were no worse than in 2011 when DDI was able to meet its contractual MSR obligations. As evidenced by a letter submitted by the senior Ed Sternfeld in 1993, the same economic deterioration DDI cites today had already occurred decades ago. (Ex. R303 (resisting a proposed rent increase by arguing, among other things, that the "[e]xtensive lay-offs in the aerospace industry" and the "[s]low economic recovery" would prohibit DDI from sustaining the increase.))

DDI's argument that its geographic location is the root of its poor sales performance is belied by the superior performance of the FCA US dealership located across the street from DDI—West Valley—which has been in operation under new ownership since November 2015 and has improved tremendously from its previous ownership. (R.T. Vol. I, 174:21-24 (Weeks) ("Q: And how would you describe West Valley Chrysler Jeep's MSR performance as of May, 2016? A: From a year-to-year standpoint, vastly improved. A near doubling their MSR performance."); R.T. Vol VII, 11:6-17 (Nouri) ("Q: Do you mind being in Canoga Park? A: I don't mind being there. I have been up in Number 1 in the area every month I have been in business since December. We were 155 percent, Number 1, year over year, Number 1, pretty much every month we have been in business there. Q: And when you say up to 150, 155 percent, is that in comparison to what the dealership – A: The same month last year. That's what we call YOY, year over year."); R.T. Vol. VII, 121:7-17 (Van Ace) (same), 122:18-123:3 ("Q: How would you describe the opportunity available to your dealership to sell its vehicles in the San Fernando Valley? A: It's a great opportunity. It's a great marketplace. Q: Why? A: I think particularly, on our side of the Valley, there's a nice credit mix. There's plenty of customers. And I find that the customers that we do have and we do get seem to be loyal. It is a great opportunity.")) Frith studied the improvement of West Valley, finding that this improvement supports the conclusion that the Canoga Park area has ample opportunity to create real sales results that DDI's operators are simply unable to capture. (R.T. Vol. X, 123:8-124:12 (Frith), Ex. R422A at 078.) West Valley's superior improvement and performance indicates that Canoga

Park is not an inherently poor area for new motor vehicle sales, but rather that a strong operator is necessary to capture the sales available in this location. Tangeman explained in his testimony:

> I, in my experience, have seen a lot of dealerships not in the most optimal or ideal location, but they – especially in today's environment, with the impact of the Internet, that is truly the new front door of a dealership is the website. And you can and have – many have increased performance and obtained very high levels of MSR and profits as well by operating out of a not so optimal location, but having a button-down, aggressive sales operations.

(R.T. Vol. III, 24:5-13 (Tangeman).) Weeks shared the same sentiment based on his own business experience, agreeing that DDI could increase its sales volume while remaining in Canoga Park; that DDI "could do volume where they are. A lot more volume where they are." (R.T. Vol. II, 9:22-10:1 (Weeks).)

DDI may also seek to argue that the Canoga Park area has become more challenging due to the opening of two new FCA US dealerships near DDI's trade zone over the past several years. Specifically, a dealership was opened in Van Nuys ("Van Nuys") in 2011 and in San Fernando ("Rydell") in 2013, both of which had previously been established dealerships prior to the bankruptcy proceedings of Old Chrysler in 2009. (R.T. Vol. III, 148:16-17 (Tangeman).) Pursuant to California law, DDI was entitled to protest the opening of both of these points due to their proximity within 10 miles of DDI, which DDI was made aware of by FCA US. (Ex. R314, R316; R.T. Vol. III, 141:11-16 (Tangeman); R.T. Vol. VIII, 69:22-70:8 (Chandler); R.T. Vol. XIII, 17:4-24, 27:5-20 (J. Sternfeld); R.T. Vol. XIV, 13:24-14:10 (E. Sternfeld).) However, DDI did not exercise its legal right to protest the opening of either the Van Nuys or the Rydell store. Instead, pursuant to an agreement with FCA US, DDI made the business decision to waive its right to protest the establishment of the Van Nuys dealership and was compensated in the form of $50,000 contributed to an upgrade of its exterior signage. (Exs. R315, 316; R.T. Vol. III, 142:5-16 (Tangeman); R.T. Vol. VIII, 69:21-70:8 (Chandler).) Ed Sternfeld acknowledged that this agreement was reached after the Sternfelds had consulted with their own legal counsel on the matter. (R.T. Vol. XIV, 17:8-13 (E. Sternfeld).)

In addition to the $50,000 that DDI received for agreeing to the establishment of Van Nuys, DDI also received another $50,000 for agreeing to the establishment of Rydell. (*See* Ex. R372 at

001; R.T. Vol. III 190:23-191:6 (Tangeman); R.T. Vol. XIII, 131:9-21 (J. Sternfeld); R.T. Vol. XIV, 26:10-24 (E. Sternfeld).) Though neither dealership was in DDI's trade zone, DDI was compensated a total of $100,000 to waive its protest to these establishments, and it did waive its right to protest. Moreover, DDI's ability to achieve MSR should not have been impacted by the presence of either the Van Nuys or Rydell dealerships because these dealers were actually located in "distinct, different markets." (R.T. Vol. III, 148:5-15, 149:8-150:14 (Tangeman).) Accordingly, the calculation of DDI's MSR requirements did not change with the reintroduction of either dealer. (R.T. Vol. X, 58:14-59:9 (Frith).) Notably, DDI's performance actually increased the year following the opening of Rydell, indicating that the opening of this dealer had no discernible effect on DDI's ability to achieve MSR. (R.T. Vol. X, 59:2-9 (Frith).) Likewise, these same dealerships were located in their present location—under different ownership—prior to 2009, during a time when DDI's more vigorous operations allowed it to meet its contractual obligations. (R.T. Vol. III, 148:16-17, 150:12-14 (Tangeman).)[14] And the Sternfelds acknowledged that the dealership made no operational changes in response to the re-opening of either dealership. (R.T. Vol. XIV, 159:18-160:6 (E. Sternfeld).)

iii. DDI's wholesale parts business does not serve as a substitute for its inability to sell new vehicles

In the alternative, DDI contends that its sales are sufficient when accounting for the sale of parts. DDI makes much of the fact that they are able to sell a large volume of parts due to the productivity of their new parts manager. However, DDI's parts sales are not relevant to the first factor in the good cause analysis. DDI's emphasis on its parts sales is akin to a student pointing to the high marks he received in gym class when asked why he flunked out for failing his math, history and science classes. DDI's shortcomings as to its contractual sales obligations, without more, are significant enough to justify the termination of the Dealer Agreements. As will be shown below,

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[14] Prior to these points being reopened under new ownership, DDI was not responsible for those territories. In other words, DDI was "able to sell into those areas, but weren't responsible for them. So their MSR objective was not affected, but they didn't have competition there as well." (R.T. Vol. IX, 237:11-14 (Frith).) Had FCA US actually given DDI responsibility for these adjacent areas while they were vacant, DDI's MSR objective would have been far higher and its MSR achievement would have been correspondingly far worse. (*Id.* at 239:4-13.)

these failures also intertwine with and support termination under numerous other statutory factors.

B. DDI's Investment in the Business Has Been Minimal and Was Only Commenced at a Point When Termination Was All but Certain

The second and third good cause factors look at both the "[i]nvestment necessarily made and obligations incurred by the franchisee to perform its part of the franchise" as well as the "permanency" of that investment. Cal. Vehicle Code §§ 3061(b), (c). DDI's investment in the franchise has been scant and is insufficient to allow the business to stay competitive. As explained above, it is this lack of investment that substantially contributed to DDI's inability to meet its contractual sales obligations for the past half-decade. This lack of investment provides good cause for DDI's termination.

1. <u>The real estate owned by the Sternfelds does not constitute an investment</u>

The Sternfelds inherited the vast majority of the assets underlying their current business from their father, Ed Sternfeld, Sr.—including the building, land and dealership. (*See* Ex. R308.) The Sternfelds have indicated that they consider the real estate they own to be a separate investment from the investment they have made in DDI, as have other dealers who own the property on which the dealership sits. (R.T. Vol. VII, 80:22-81:1, 82:1-17 (Nouri) ("Q: What's more valuable to you, the property or the franchises? . . . . A: That's a tough question. I probably—just because it is Southern California, I love the property more.")) Indeed, Ed Sternfeld acknowledged during his testimony that, if he were to repurpose the land on which DDI sits, the land's "value goes way up." (R.T. Vol. XIV, 61:16-21 (E. Sternfeld).) The Sternfelds also acknowledged they have been contacted on occasion by people interested in purchasing the property. (R.T. Vol. XIII, 123:23-25 (J. Sternfeld).) The Sternfelds' evaluation of their land comports with Nouri's testimony regarding his decision to purchase West Valley Chrysler Jeep. (R.T. Vol. VII, 81:6-10 (Nouri) ("Q: Okay. Did you buy the franchises and the property as a real estate investment or to operate the franchises there? A: I had the choice not to buy it. I bought it for the real estate investment.")) Regarding his conversations with the prior owner of the Chrysler Jeep dealership about the real estate aspect of the transaction, Nouri explained that "[h]e really didn't want to sell it. He said because eventually, if you move, they could sell it to these people for building apartments on there. And I said 'I'm not going to buy your dealer[ship] unless I own the property." (R.T. Vol. VII, 37:18-38:5 (Nouri); *see also id.* at 79:3-7, 83:11-15, 84:5-16.)

Walter's review of DDI's financial statements also confirms that the real estate and building are treated as separate assets not belonging to the dealership. (R.T. Vol. IX, 83:1-18 (Walter).) The Sternfelds confirmed the same, and in fact, the building is owned by a different ownership group and as a different business entity. (R.T. Vol. XIII, 129:20-130:5 (J. Sternfeld).) Indeed, DDI leases the property and facility from the separate entity. (R.T. Vol. XIV, 198:21-199:2 (E. Sternfeld).) DDI cannot take credit for an investment made by a different and separate business entity than DDI. Walter further explained that "the dealership certainly does not own [the building or land], and they're paying rent." (R.T. Vol. IX, 83:9-10 (Walter).) Because they are separately owned, if the present termination is successful, the Sternfelds will have no restriction on their ability to sell this real estate or to use it for another purpose, likely at a higher profit than its current use. (*Id.* at 83:12-18.)

2. **<u>DDI has not made sufficient investments in numerous aspects of its business</u>**

Walter reviewed the changes in the amount of fixed assets DDI reported in its financial statements, which correspond to the charges DDI was forced to incur to become ADA compliant and to fulfill its 2007 plan to update the facility. (R.T. Vol. IX, 78:1-79:25 (Walter), Ex. R423A at 004 ¶ 11(i), 031-032.) Walter's analysis further compared DDI's capital contributions relating to those improvements against DDI's corresponding profits for those same years, concluding that DDI's investment relative to its size and profitability was "[m]inimal." (R.T. Vol. IX, 79:23-25 (Walter); Ex. R423A at 032.) Walter added to this conclusion by pointing to the fact that the vast majority of DDI's balance sheet assets were current—being "turned over" within at least one year—as opposed to fixed and permanent assets: "And so when I look at a balance sheet that's got well north of 95, probably almost 98 or 99 percent of the dealership in current assets, as it relates to the assets of the dealership, I would consider that dealership not being very permanent in the sense of its balance sheet." (R.T. Vol. IX, 182:1-16 (Walter).)

As explained above, DDI waited years after their initial, 2007 plan to renovate its facilities before doing anything at all to renovate. Once the Sternfelds actually undertook to renovate the dealership, after the cure period in the Notice of Default had already lapsed and at a point where termination was all but certain, the renovations made were insufficient. Aside from the facilities' lack of modernization, there are various dimensional deficits in the size of the showroom (over 7,000 square-foot deficit) and the amount of customer parking (over 40,000 square-foot deficit). (Ex. R305.) Indeed, DDI's own expert concurs with the undersized nature of the facility. (*See* Ex. P181 at ¶¶ 35, 38, 41 (describing the dealership as "land-locked in a space-constrained manner" that "diminishes [DDI's] sales of new vehicles—particularly Dodge vehicles."); R.T. Vol. XII, 130:16-22, 135:1-10 (Stockton).) The structures used for the dealership were built in the 1960s and up until recently, little had changed from the time of their original construction. (*See* Section IV.A.4.ii., *supra.*) Despite FCA US's guarantee of $50,000 to fund DDI's signage upgrades, it was not until years later, after the expiration of the cure period for the Notice of Default, that DDI actually made use of those funds to begin upgrading its facilities. Virtually no other improvements have been made in the facility other than expanding a bathroom and fixing curbs in response to an ADA lawsuit filed against the dealership. (R.T. Vol. XIV, 161:18-162:10 (E. Sternfeld).)

Numerous other aspects of DDI's business have suffered as a direct result of DDI's decisions not to make adequate investments in the business. The Sternfelds have made only nominal investments in the goodwill of the business in the form of advertising. (*See* Section IV.A.4.i., *supra.*) This practice, in conjunction with poor inventory and staff, has caused many customers near DDI to leave the area to find other dealers to purchase the FCA US products from. The Sternfelds have also made minimal investments in their personnel. (*See* Section IV.A.4.ii., *supra.*) The Sternfelds failed to provide adequate training to their employees and their employee compensation is poor. (*Id.*) The Sternfelds have also consistently chosen unqualified personnel that would accept lower wages and have kept their staff count below what would be needed to meet their MSR (Ex. R423A at 004 ¶11(h).) These practices have resulted in a high turnover among DDI's employees.

3. <u>Whatever investments DDI purports to have made are not permanent</u>

The investments made in the dealership are not permanent. DDI keeps the majority of its assets in cash and cash equivalents that are liquid and therefore not permanent. (Ex. 423A at 004 ¶

11(i); R.T. Vol. IX, 39:1-12 (Walter).) The dealership's working capital, at over $4 million, is more than double the guideline amount set by FCA US for dealers of DDI's size. (*Id.* at 40:18-25 (referring to Ex. R320 at 001.)) The money could and would go with Ed and John Sternfeld if the dealership is terminated. The building and property are not owned by the dealership and cannot be considered an investment of the dealership. Instead, the building and property are owned by a separate investment company. If terminated, the building could be rented or sold, and its "value [to the Sternfelds, not DDI] goes way up." (R.T. Vol. XIV, 61:16-21 (E. Sternfeld).). The vehicle inventory, tools, accessories and parts inventory would similarly be sold and, in certain circumstances, must be repurchased by FCA US. (*See* Ex. R302 at 012 §29.)

In the Sternfeld's letter to FCA US of April 27, 2014—sent only three days before the six month Notice of Default cure period was set to expire—the Sternfelds promised that they were undertaking an upgrade of their computer system and phone system. (Ex. R360.) The computer system was not active until June, 2015, well after the cure period provided for in the Notice of Default had expired. (Ex. J-4_0197:8-11 (Derengowski Dep.).) Yet the computer system was poorly managed, and this supposed upgrade only resulted in "[l]ots more work with the new computer" and no noticeable benefit to the business. (*Id.* at J-4_0197:4-5, J-4_0224:19-J-4_0225:3.) The phone system was never purchased, and no efforts were ultimately undertaken by the Sternfelds to upgrade the phone systems other than "talk[ing] about it." (*Id.* at J-4_0197:12-20; R.T. Vol. XIII, 180:15-19 (J. Sternfeld).)

Accordingly, the dealership's investments and obligations are minimal and these investments are not permanent, to the extent they exist at all. Like factor one, statutory factors two and three both weigh in favor of termination.

C. The Public Welfare Is Harmed by Allowing DDI to Remain as an Ineffective, Uncompetitive Dealer That Does Not Serve the Market or Customers

The fourth good cause factor analyzes "[w]hether it is injurious or beneficial to the public welfare" to terminate DDI. Cal. Veh. Code § 3061(d). As described above, DDI's failure to adequately meet the demand of the consumers in the San Fernando Sales Locality shows that replacing DDI with a vigorous FCA US dealer will benefit consumers. "A successor dealership would actually be better for the public: [b]etter from a sales tax basis, better from a taking care of the customers basis, better from an employment perspective, because they would be able to sell more cars and have more people to do it." (R.T. Vol. VIII, 60:23-61:6 (Chandler); *see also* R.T. Vol. VIII, 177:24-178:8, 178:24-179:1 (Nevers).) Although DDI may argue otherwise, FCA US fully intends to replace DDI with another dealer. (R.T. Vol. VIII, 61:7-17 (Chandler) ("I was a national dealer placement manager for five years. I know what the plan is for Canoga Park/Woodland Hills, and it is to have a dealership there."); R.T. Vol. VIII, 178:21-23 (Nevers) ("Q: How long do you anticipate it would take to get a replacement dealership? A: I would estimate from the moment I would start, 30 to 60 days.")) Indeed, there will be no impact on FCA US customers as the dealership across the street, West Valley, will be able to perform service work while a new dealership is started. Conversely, if DDI's Dealer Agreement is not terminated, the dealership will continue to provide inadequate sales operations and opportunities for customers—as evidenced by the dealership's hundreds of lost sales over the past five years.

Most importantly, DDI's continued operation is harmful to the public welfare because its operators have made the business decision to refuse to serve a significant population of the consumers that reside in the Woodland Hills Trade Zone. As explained above, DDI is located in Canoga Park, which DDI claims is an economically depressed location. (*See* Section IV.A.5.ii., *supra.*) According to the Sternfelds and others, Canoga Park is home to individuals with low incomes and poor credit. (*See* R.T. Vol. II, 93:15-94:4 (Weeks) ("Q: Do you have an opinion whether or not there are more or less sub-prime opportunities in Canoga Park? . . . . A: There are ample tier 5 [i.e. subprime] opportunities throughout the San Fernando sales locality, including Canoga Park.")) As described by Van Ace of West Valley Chrysler Jeep,

> [A] subprime is based on credit score. So 620 and below, so 619 and below that is really considered a subprime deal. As far as customers that come through the door and opportunities to do business, 37 percent of the people we run credit on are subprime.
> Q: So that 37 percent of people that you run credit on, would you consider that the community that you're selling cars to?
> A: Thirty-seven percent of it.

(R.T. Vol. VII, 123:12-23 (Van Ace).)

Notably, however, Wells Fargo Dealer Services—DDI's partner for indirect auto financing—acknowledges that DDI does not offer its products to individuals with poor credit. This fact is borne out by reference to DDI's "loss ratios," which is a measure of the frequency at which purchase loans from the dealership experienced an adverse credit event, such as a "repossession or a total loss" or "charge offs." (Ex. J-4_0372:7-22 (Johnson Dep.).) As testified by DDI's banker, Ms. Johnson, DDI's loss ratio over time is negative .13% and varies from surrounding dealerships by a wide margin. Indeed, Ms. Johnson agreed that DDI "couldn't even have had one [repossession or charge off] to get this kind of a ratio" (*Id.* at J-4_0372:20-22.) By contrast, other dealers in the territory surrounding DDI, including Thousand Oaks, Simi Valley, and the San Fernando Valley, collectively experienced a positive loss ratio of .51%. (*Id.* at J-4_0370:13-J-4_0371:18.) Likewise, the surrounding region experienced an even higher loss ratio of .76%. (*Id.*) DDI's abnormally low loss ratio—it is inverted, indicating no losses whatsoever—indicates that it is only willing to sell vehicles to consumers with a far higher credit score than what is required by surrounding new vehicle dealers. Yet the overwhelming wealth of evidence submitted at the Hearing indicates that the primary consumer residing in the Canoga Park area would tend to have low income and low credit. DDI's operators have made the business decision not to serve this part of their community.[15]

Ms. Johnson went further to explain her understanding of DDI's business philosophy as to subprime loans, based on her numerous years assisting the Sternfelds with their financing:

> I'm thinking that would be on the indirect side and just the fact that they don't do a lot of deals that are subprime and non-prime and shady which creates big losses. And I'm assuming that's probably supported by the documents showing that they have no losses in their portfolio. . . . So they try very hard to make sure that anybody who walks in the door has good credit. Some of the people that come in that have bad credit are a little shady maybe and might be fraud.

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[15] Ms. Johnson confirmed that this decision was DDI's, not Wells Fargo's, as she acknowledged that the bank is "a significant retail player in the auto industry" and that Wells Fargo "would support [DDI's] needs to finance what they send us as long as it's an approvable deal." (*Id.* at J-4_0384:14-18.); *see also* R.T. Vol. VII, 124:9-18 (Van Ace) ("We have quite a few banks that we do business with, and a lot of them buy subprime. The top three for that would – the top four would probably be Chrysler Capital, Wells Fargo, Capital One, Ally. Those are probably the top four. . . . those are the four people that are willing to take that paper.")

(Ex. J-4_0391:4-14 (Johnson Dep.).) Stockton also agreed that DDI made the business decision to be "considerably less aggressive than some of their neighbors are" at serving subprime customers. (R.T. Vol. XII, 139:11-16 (Stockton).) Stockton likewise agreed that DDI could attract more potential customers if it would more aggressively pursue subprime, as these are the type of customers surrounding the dealership in Canoga Park. (*Id.* at 140:11-23.) Because DDI has chosen to ignore this significant portion of their community, their continued operation is harmful to the public welfare.

Consumers in DDI's trade zone are also harmed by DDI's poor performance and business practices in terms of convenience. At the hearing, FCA US introduced evidence of what are called "pump-ins." These are sales made by dealers in surrounding areas to customers in DDI's Trade Zone. Pump-in sales into DDI's market are extremely high, meaning customers are driving past DDI to purchase vehicles from dealerships located miles away. A review of the Woodland Hills Trade Zone shows that, in 2015, 73.9% of all Dodge vehicles sold into that trade zone were from dealerships outside the trade zone, and through April 2016, 73.3% of the Dodge and RAM units in the trade zone were sold by dealers other than Dependable Dodge. (Exs. R334, R335.) These objective statistics demonstrate that individuals residing within the Woodland Hills Trade Zone are driving miles outside of this territory, and away from DDI to buy the same vehicles available to them at DDI. (R.T. Vol. V, 40:19-41:1 (Cholagh).) Frith also confirmed this with his expert analysis, demonstrating that the sales of DDI were only a fraction of the overall Dodge and RAM sales being made to consumers in the Woodland Hills Trade Zone. (Ex. R422A at 008, ¶21, 054; Ex. 422C at 293-295; R.T. Vol. X, 73:4-78:7 (Frith).) This community would surely be better served by having a dealership within this trade zone that could meet its consumers' needs.

FCA US also presented evidence at the Hearing demonstrating that DDI overprices its vehicles relative to surrounding FCA US dealers selling the same products. As the Sternfelds acknowledge, the way DDI prices its vehicles is a business decision of the dealership, not FCA US. (R.T. Vol. XIII, 104:10-12 (J. Sternfeld).) Significantly, Walter demonstrated that as DDI experiences a higher gross profit for each vehicle sold, it experiences a corresponding decline in its MSR. (Ex. R423A at 003, ¶11(a)-(b), 010-016.) DDI's gross profits per vehicle are unusually high, meaning that they are selling their vehicles at an unusually high profit margin. Regarding this data, FCA US's expert accountant Walter testified that "as an analyst, looking at this is that on a consistent basis over time, [DDI] is charging considerably more to the consumer than the other geographic dealerships. And considerable is, in this case, well north of $500 on a regular basis, up to as much as 8 to – 800 to close to 1,000." (R.T. Vol. IX, 54:22-55:6, 209:22-24 (Walter).) Not only does this equate to higher prices for consumers, it also results in DDI selling fewer vehicles (because consumers are forced to go to other dealerships, even those located many miles away, to buy the same car for less). (*See, e.g.* Ex. R365 (explaining that DDI's over-pricing of its vehicles was among the causes of its "worst monthly sales performance in history.") Frith also analyzed evidence showing that DDI prices its vehicles significantly higher than other FCA US dealers in the Los Angeles area. (Ex. 422A at 076; R.T. Vol. X, 119:2-18 (Frith).) Discussing the dealership's pricing practices, John Sternfeld acknowledged that DDI provides its sales personnel an incentive compensation that encourages them to sell vehicles at a higher gross profit. (R.T. Vol. XIII, 74:1-79:11 (J. Sternfeld); Ex. R429.)

DDI's non-competitive pricing practices are not only bad for consumers, but also explain, in part, its poor sales performance and violation of the Dealer Agreement (both statutory factors). (*See* Ex. R423A at 003 ¶11(c), 017-018.) For example, in 2015, DDI sold the Dodge Challenger at a gross profit that exceeded other nearby Dodge dealers by nearly $1000 per vehicle sold. (Ex. R423A at 011.) This time period also corresponded with the Notice of Default cure period that DDI was then operating under. Unsurprisingly, DDI's sales of the Challenger during 2015 were extremely low, reflecting the fact that consumers could buy the same car for far less at almost any other dealership where it was sold. DDI achieved an unacceptable 75% of MSR for the Challenger in 2015, directly correlating with the dealership's business decision to charge up to $1000 more for this vehicle than other dealers. (Ex. R326 at 012.) DDI made this same business decision for numerous other vehicle lines, and experience the same poor sales performance for each of these lines. (*Compare* Ex. R423A at 012-014 (showing that DDI sells the Charger, Dart, and Journey for hundreds more than surrounding dealers) *with* Ex. R326 at 012 (showing that DDI's MSR achievement for the Charger, Dart, and Journey was far below contractual requirements.); *see also* R.T. Vol. IX, 57:6-59:12

(Walter).)

Acknowledging this direct correlation between DDI's pricing practices and its poor sales results, Walters described it as "[e]conomics 101, in terms of your price goes up, the volume goes down and vice versa." (R.T. Vol. IX, 56:8-24 (Walter).) Stockton also acknowledged the correlation between DDI's pricing practices and its inability to achieve its MSR requirements. (R.T. Vol. XII, 141:18-143:6 (Stockton).) When DDI's gross profit across all vehicle lines is compared against its MSR achievement across all vehicle lines, this correlation becomes obvious and demonstrates that DDI's business decision to overprice its vehicles relative to the rest of the market is a significant cause of its inability to achieve its contractual sales requirements. (Ex. R423A at 017-018; R.T. Vol. IX, 60:14-62:5 (Walter).) Stockton's analysis confirmed the same correlation. (*See* R.T. Vol. XII 149:19-151:17 (Stockton).) And the significant profit per vehicle that DDI achieves over other dealers persists even when other factors are accounted for, such as volume incentives earned by other dealers. (R.T. Vol. IX, 86:3-87:11, 91:15:23 (Walter) ("Again, [DDI], on an overall basis, each year consistently is several hundred dollars more expensive. No matter whether you look at it on a new basis, a Ram basis, a Dodge basis, a model basis, a new and used basis, or a new and used and wholesale basis, they are more expensive. And that certainly is contributing to their failure to achieve the sales MSR that would be more representative of meeting the market opportunity."); Ex. 423B at 047-048.)

DDI may argue that its termination would have a negative impact on the public welfare because it would no longer be able to serve the community with its wholesale parts business. However, this argument ignores the fact that the wholesale parts business is more fungible than the sale of new motor vehicles. John Springer, FCA US's service and parts manager for the California Business Center, (Ex. J-4_0516:3-9 (Springer Dep.), was asked "[i]f [DDI] were terminated, do you think that would have any. . . adverse impact on parts sales?" (*Id.* at J-4_0531:18-20.) Springer testified that:

> I mean, we have dealers that terminate all the time. I have dealers that go through buy/sells. It's hard to say. Sometimes a business will pick up – such as Dependable; right? We had a big wholesale dealer go out of business. Some of the business was picked up by Dependable. Other dealers picked up that business as well.

(*Id.* at J-4_0531:22-J-4_0532:4.)

In terms of repair service, DDI's absence would not impact the public in any way. As noted above, DDI has experienced several issues with its customer service, as reflected in its CEI ranking (*See also* Section D., *infra.*) Likewise, as noted above, an FCA US dealership is located directly across the street from DDI—West Valley—that is competent to service Dodge and RAM customers during the short time it will take to find a new dealer to replace DDI. (R.T. Vol. III 78:15-79:2 (Tangeman) ("Well, with the public, the most critical issue is service. If you close a dealership, and you have consumers who bought a vehicle, and need to service a vehicle, where are they going to go? And in our consideration of that impact, it was clear we had a dealership right across the street that was available. Though it had the brands of Chrysler and Jeep, our dealers are allowed and approved to provide warranty service for any of our brands, Chrysler Jeep Dodge or Ram."))

DDI's refusal to carry adequate inventory to offer for sale to the consuming public, upgrade its signage, maintain an adequate and trained sales staff, and operate from a modern facility, not to mention its business philosophy to charge high prices, has—and will continue to—diminish the customer experience. The people on the ground at DDI—salespersons and managers—suffer a high degree of turnover and they receive virtually no training. The customers are forced to work with and rely on people at DDI that are not qualified to sell them $50,000 and $60,000 vehicles. Further, customers that do visit DDI are faced with an inadequate selection of vehicles to choose from, at a facility that is not competitive with other dealerships in the area. A more zealous replacement dealer, who honors its contractual commitments, will rectify these deficiencies to the benefit of the public interest, generate more sales in the area, more tax revenue for the area, better trained staff, better inventory to select from, more jobs, better hours of operation[16] and better facilities. The evidence presented at the Hearing proved that FCA US intends to immediately replace DDI if this protest is denied. Having failed to meet consumer demand and provide a positive and convenient customer

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[16] *See* R.T. Vol. VII, 135:16-136:15 (Van Ace) ("A: . . . . Our hours of operation are far different from [DDI] across the street. That's a difference in business practice . . . . Q: How are your hours different at West Valley from the hours at [DDI], if you know? A: I notice all the time on the weekends because they'll pull the chain, meaning, across their driveway and shut everything off sometimes six o'clock, seven o'clock. They just shut – they just shut it down.")

experience, consideration of the injury and benefit to the public favors termination.

D. DDI Is Not Well Equipped to Meet the Needs of the Public

The fifth good cause factor broadly considers whether DDI is well equipped, in terms of sales and service facilities, personnel, equipment, and parts, to adequately serve the public. Cal. Veh. Code § 3061(e). It is not. All of the reasons explained above as to why good cause exists regarding the first four factors of Section 3061 also militate in favor of finding good cause for termination under this factor. As discussed above, DDI's facilities are inadequate. The showroom and lot are too small, there is inadequate room to carry adequate inventory, and the building is dated. The dealership is located in close proximity to a strip club, where there was recently a shooting, and according to Ed Sternfeld, there is frequent gang activity in the area. The years DDI's operators obstinately refused to make any changes to the facility further demonstrate that its operators will be unwilling to modernize the facilities in the future.

DDI's sales and service personnel are inadequate in numbers, training and quality, and DDI's operators have not made the operational investments necessary to allow them to improve this situation. DDI routinely fails to train its employees and chronically undercompensates its employees, leading to high turnover rates among DDI's employees. Due to its low compensation, DDI attracts poor quality employees, including convicted felons that it then places in a position to take confidential, private and financial information from customers. Although DDI makes much of their parts sales, this is not adequate to make up for the numerous other inadequacies of the dealership. DDI is not well equipped to meet the needs of the consuming public on many levels and its termination is warranted.

In terms of customer service and sales experience—or CEI—DDI's lack of operational investment in its personnel has led to extremely inconsistent outcomes in its ability to create a positive atmosphere or experience for its clients. (*See* R.T. Vol. II, 109:24-110:1 (Weeks) (indicating DDI's customer service achievement has "been an issue at times."); Ex. J-4_0277:17-21 (Gifford Dep.) (acknowledging that "there were some deficiencies on the service side" of DDI). For example, Agnes Gifford—a former FCA US employee that was responsible for, among other things, overseeing customer service at DDI—testified that she had various meetings with DDI representatives to review their customer service reports due to the fact that the dealership "falls under the Business Center contact category," which was part of FCA US's steps to "identif[y] dealers that had some areas of opportunities to improve on the customer experience processes." (Ex. J-4_0310:23-J-4_0311:4 (Gifford Dep.).) In other words, DDI had been identified in the Business Center contact category because it was "performing below average" on its customer service metrics, and FCA US undertook to meet individually with the dealership to "go in and review the various reportings that were available, review and identify what the processes of deficiencies are so that we can improve on it and provide recommendations on how we can improve, how the dealership can improve." (*Id.* at J-4_0311:15-J-4_0312:4.)[17]

Indeed, DDI was identified on occasions as the worst dealer of its size in the California Business Center for customer service. (Ex. R394 at 003; R.T. Vol. I, 147:16-19 (Weeks).) As to DDI's CEI ratings around the time the Notice of Termination was issued, Tangeman testified that

> A: Well, of the dealer[s] in Group C, [DDI is] at the bottom. They're number 32 for sales. The one-month score of 50, and their three-month score of 55, and then the service score of 68 and 72, one-month versus three-month.
> Q: And how would you characterize those scores?
> A: Very poor. At the bottom of the list.
> Q: In deciding to issue the notices of termination to [DDI], did you consider the impact that was going to have on the public?
> A: We did.

R.T. Vol. III, 78:9-18 (Tangeman) (reviewing Ex. R394.) DDI was sent numerous letters by FCA US warning the dealership that it was falling below its contractual obligations as to customer service and encouraging the dealership to rectify this shortcoming. (Exs. R350, R351, R353, R354, R355, R356, R358.) DDI was also sent an "Action Plan" by FCA US representatives identifying DDI's shortcomings and providing suggestions for improvement that were largely ignored by the dealership. (R375.) Ultimately, DDI's inconsistent customer service was considered and influenced FCA US's decision to issue the Notice of Termination. (R.T. Vol. IV, 196:11-197:4, 198:11-22

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[17] DDI's poor service performance is reflected in their substantially below-average service sales. Frith pointed out that DDI's "service department, compared to the units in operation in its trade zone, generates, well, less than half of what the composite dealers do." (R.T. Vol. XI, 34:9-18 (Frith); Ex. R422A at 076.)

(Tangeman).) DDI is clearly incapable of meeting the needs of the public and this good cause factor weighs heavily in favor of termination.

E. DDI Has Not Fulfilled Its Warranty Obligations

The sixth factor considers whether warranties are being honored by the dealer. Cal. Veh. Code § 3061(f). While warranty was not the main focus of the Hearing, DDI has not honored its warranty obligations; therefore, this factor weighs in favor of termination. The evidence introduced at the Hearing shows that FCA US analyzed DDI's warranty submissions and found them to be out of line with warranty policies and procedures at times. (*See* Exs. R377, R380.) Ed Sternfeld acknowledged that he had been counseled on these issues. (R.T. Vol. XIV, 181:15-182:22 (E. Sternfeld).) When asked whether FCA US was competently fulfilling its warranty obligations, Jeffrey Clark, the FCA US parts and service manager responsible for DDI, explained that "we do have some policies in place that require warranty claims to be paid within 60 days. So I know of late some claims have gone over that 60-day requirement to be authorized . . . ." (Ex. J-4_0076:21-77:4 (Clark Dep.).) Clark also testified to the high turnover of service managers at DDI, explaining that at one point recently the dealership was forced to hire one sales manager described as a "green bee. He was learning his job. He had no prior experience of management, no prior experience of a domestic run dealership, no prior experience of warranty." (*Id.* at J-4_0083:14-17.) Because DDI was not complying with FCA US's warranty policies, this factor also weighs in favor of termination.

F. The Final Good Cause Factor Weighs Heavily in Favor of Termination – DDI Consistently and Materially Violated the Terms of Its Franchise

The final "good cause" factor considers the "[e]xtent of franchisee's failure to comply with the terms of the franchise." Cal. Veh. Code § 3061(g). Each and every one of the deficiencies described above regarding the inadequate operation of DDI's business also constitutes a material breach of the Dealer Agreement:

1. Ex. R301, § 4; Ex. R302, § 11(a): As explained above, DDI's failure to maintain (or even come close to meeting) its MSR requirements constitutes a significant, material breach of the Dealer Agreement.

2. Ex. R302, § 11(b): As explained above, DDI has failed to uphold its contractual obligations to adequately service vehicles. This constitutes a material breach of the Dealer Agreement.

3. Ex. R302, §§ 11(d)(i), 11(g): As explained above, DDI waited nearly a decade to rehabilitate its facilities, which are still inadequate, including upgrading its brand signage. DDI's failure to perform these obligations is a material breach of the Dealer Agreement.

4. Ex. R302 § 11(f): As explained above, DDI has also experienced significant failings in its ability to retain and train qualified personnel. This is a contractual obligation, and DDI's failures constitute a material breach of the Dealer Agreement.[18]

5. Ex. R302, § 12: As explained above, DDI has significantly underfunded its advertising efforts, and has fallen short particularly in its internet advertising efforts. This is a material breach of the Dealer Agreement.

(*See also* R.T. Vol. III, 46:3-51:19 (Tangeman) (acknowledging DDI's various breaches of the Dealership Agreement.)) Incredibly, DDI did not have a full copy of the Dealer Agreement that it could produce in connection with this litigation, but instead produced only bits and fragments of these documents. Indeed, John Sternfeld admitted that he could not recall ever seeing the Dealer Agreement except during the course of this litigation. (R.T. Vol. XIII, 53:10-56:17 (J. Sternfeld).) DDI not only breached the Dealer Agreements, but its inability to even keep a complete copy of the Dealer Agreement indicates that DDI did not take its commitments seriously or even undertake to have a full understanding of its contractual obligations.

FCA US provided DDI with constant notifications that the terms of the Dealer Agreement were in breach, and FCA US continually offered assistance to help DDI cure these breaches. DDI chose not to remedy its numerous breaches of the Dealership Agreement and, in fact, ignored the communications from FCA US, electing to not even respond to these numerous letters. Accordingly, when FCA US was ultimately forced to issue the Notice of Termination, it incorporated all of the above listed breaches of the Dealer Agreement by reference to paragraphs 28(b)(i) and (ii) of the Dealer Agreement. (Ex. R361 at 001; Ex. R362 at 001.) Among other things, paragraph 28(b)(i) and (ii) permit FCA US to terminate the Dealer Agreement based on DDI's failure to meet its sales obligations pursuant to paragraph 11(a), based on DDI's failure to maintain adequate service pursuant to paragraph 11(b), based on DDI's failure to maintain up-to-date facilities pursuant to

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[18] Notably, the Dealer Agreement expressly provides that a "[p]rotracted failure to comply with such training requirements may result in termination of this Agreement pursuant to Paragraph 28 . . . ." (*Id.*)

paragraph 11(d)(i) and 11(g), based on DDI's failure to retain and train qualified personnel pursuant to paragraph 11(f), based on DDI's failure to sufficiently advertise pursuant to paragraph 12. (Ex. R302 at §28.) Because all of the above defects in DDI's operations also constitute material breaches of the Dealer Agreement, all of the above listed breaches were incorporated into the Notice of Termination by reference to paragraph 28. (R.T. Vol. VIII, 56:4-19, 58:12-59:14, 132:2-133:10 (Chandler).)

Based on DDI's numerous material breaches of the Dealer Agreement spanning over five years, termination is warranted. FCA US should not be forced to continue in business with a partner that does not meet its end of the bargain. FCA US should be permitted to do business with a dealer that will be a productive partner, one that will honor its contractual obligations and one that will serve the consuming public up to the same standards that FCA US holds itself.

G. DDI's Assertion That FCA US Has Pursued This Termination for Reasons Other Than the Good Cause Factors of Section 3061 Is Without Merit

DDI contends that FCA US has ulterior motives in pursuing the present termination – that FCA US is not seeking to end its failing business relationship with DDI because of DDI's numerous years of sub-standard performance and DDI's obstinate refusal to improve. Instead, DDI contends that FCA US is pursuing DDI's termination in an effort to coerce the Sternfelds to sell the dealership to another investor—Nouri—in order to combine the West Valley Chrysler and Jeep franchises with DDI's Dodge and RAM franchises and move the consolidated entity to the auto row in Woodland Hills. Not only is DDI's argument unsupported by the record, DDI, in an effort to cobble together this theory, mischaracterizes the facts in an effort to make FCA US's legitimate network goals appear nefarious. DDI seeks to draw attention away from the real controversy at issue in this proceeding: whether good cause for termination exists pursuant to Section 3061 based on DDI's half-decade of inability and refusal to meet its contractual obligations.

As to DDI's contention that FCA US has sought to force a buy/sell transaction with the Sternfelds and Nouri, all of the testimony received at the Hearing directly contradicts this argument. (R.T. Vol. IV, 223:21-224:4 (Tangeman) ("Q: . . . . Did you ever imply that FCA [US] could or would provide [Nouri] with the Dodge or Ram lines? A: No. Q: What did you tell him? A: I told him that, as all independent businesses, he's free to go and structure any deal that he wishes to try to structure." Likewise, none of the testimony received at the Hearing could support DDI's contention that there was some sort of *quid pro quo* agreement with Nouri to move to Woodland Hills if he were provided with Dodge and RAM franchises. Indeed, all of the testimony at the Hearing by FCA US witnesses contradicts this contention. (*Id.*at 231:10-19 ("Q: You at one point requested that Nouri execute an agreement agreeing to relocate the franchises; do you recall that? A: No. Q: No? Okay. At no point did you offer Nouri or propose that Nouri execute an agreement agreeing to relocate his franchises to Woodland Hills? . . . . A: Absolutely not."), *Id.* at 233:5-10 ("Q: You have had discussions with Mr. Van Ace about acquiring the Dodge Ram franchises, haven't you? A: No. Q: Have you had discussions with Mr. Van Ace about relocating the franchises? A: No."); R.T. Vol. VIII, 214:22-215-6 (Nevers) (explaining his statement to Nouri that "the only way to get all four is to go across the street. I have no authorization to pedal or to solicit their brands. You have to do it yourself."); *see also id.* at 236:3-9 ("I'm responsible for whatever market action would lead to that, but I don't have any target or any mandate to move Canoga Park dealers to Woodland Hills.").

As to DDI's contention that FCA US is attempting to consolidate the Chrysler, Jeep, Dodge and RAM franchises, DDI's conspiracy theory is disproven by the multiple FCA US witnesses who testified at the Hearing that DDI's situation as a stand-alone dealership is not objectionable in and of itself, nor is DDI's location in Canoga Park fatal to FCA US's goals. FCA US would consider replacing DDI with another standalone Dodge and RAM dealership if the present termination is successful. (R.T. Vol. III, 152:25-153:6 (Tangeman); R.T. Vol. VIII, 64:21-23 (Chandler).)[19] Nevers, who is presently in charge of the California Business Center, testified to his preference in certain circumstances to keep stand-alone dealerships and cited numerous examples of other FCA US dealers throughout the country where the affirmative decision was made to avoid consolidation.

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[19] In fact, FCA US is no longer pursuing consolidation of its franchises as an institutional aspiration, but rather the opposite. (R.T. Vol. VIII, 64:21-65:18 (Chandler).) As testified by Chandler, "[w]e have a direction now that we're attempting to try to establish Jeep standalone dealerships and then have a separate Dodge Chrysler [and] Ram dealership, because again, in our infrastructure, generally in the metros, we're kind of out stripping what we have available." (*Id.* at 65:13-18, 111:1-10, 113:1-7.)

(R.T. Vol. VIII, 169:8-170:13 (Nevers).) Nevers further testified to numerous examples of stand-alone Dodge RAM dealerships that flourished. (*Id.* at 168:9-16.) FCA US would also consider replacing DDI with a new dealer in Canoga Park. (R.T. Vol. III, 153:8-154:16 (Tangeman); R.T. Vol. VIII, 62:8-10, 64:3-6 (Chandler); R.T. Vol. VIII, 162:21-23 (Nevers).) Indeed, DDI's theory does not make sense, as "Nouri did not express to [FCA US] that he was willing to [move to Woodland Hills or elsewhere] in any shape or form . . . ." (R.T. Vol. IV, 35:16-19 (Tangeman).) Nouri himself testified to this effect as well. (R.T. Vol. VII, 11:2-5 (Nouri).) [20]

As to DDI's contention that FCA US is pursuing this litigation as a means to relocate the dealership to the Woodland Hills auto row, various witnesses testified that FCA US had no definite plans to locate a new dealership in Woodland Hills, nor had steps been taken to secure a location in Woodland Hills for a dealership. (R.T. Vol. IV, 129:1-17 (Tangeman); R.T. Vol. VIII, 104:16-105:4 (Chandler); R.T. Vol. V, 171:24-172:8 (Cholagh).) Notably, DDI was never told that its request would be denied if it asked to relocate to the Woodland Hills auto row, nor was such a request ever made by DDI. (*See, e.g.* R.T. Vol. VIII, 166:6-22 (Nevers); R.T. Vol. XIV, 167:7-25 (E. Sternfeld).) Instead, various FCA US witnesses confirmed merely that the Woodland Hills Trade Zone and San Fernando Sales Locality had been studied as part of the company's network activities, and the conclusion had been reached that it would be preferred that the dealership be located in the Woodland Hills auto row near the other new vehicle dealers. (*See, e.g.* R.T. Vol. I, 201:14-19 (Weeks); R.T. Vol. IV, 128:3-6 (Tangeman); R.T. Vol. VIII, 62:8-10, 102:17-19 (Chandler); R.T. Vol. VIII, 159:13-14 (Nevers).) Ed Sternfeld similarly agreed that Woodland Hills would be preferable to DDI's current location, yet he never took any actions to try to move. (R.T. Vol. XIV, 166:24-167:6 (E. Sternfeld).) As part of FCA US's study, Cholagh testified that the Market Representation group had performed a "blueprint study" in May, 2015 which provided a "macro

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[20] DDI makes a similar argument that FCA US representatives in charge of the California Business Center are pursuing this termination not because DDI is one of the worst dealers in California, but because these individuals would face demotion or other adverse employment action if they do not establish FCA US representation in the Woodland Hills auto row. However, DDI was unable to develop any evidence at the Hearing that would lend any credibility or support for this theory. (*See, e.g.* R.T. Vol. III, 157:18-23 (Tangeman).) Chandler, Nevers and Tangeman all testified that changes in FCA US's staffing had no relationship to DDI.

level analysis" of potential modifications or additions to FCA US's dealer network, looking out five years into the future. (R.T. Vol. V, 54:21-55:11 (Cholagh).) The blueprint study raised the "topic for discussion of where the optimal location could be" for the FCA US dealers in the Woodland Hills Trade Zone. (*Id.* at at 56:14-22; Ex P173 at FCA_002881.) That discussion focused on the fact that the "Woodland Hills area by the Ford and Honda dealer and the Hyundai dealer seemed more optimal than Canoga Park." (*Id.* at 56:20-22.) At the behest of FCA US in-house legal counsel, Cholagh also conducted a "market study" of the San Fernando Sales Locality that "validated" this discussion. (*Id.* at 173:2-21; Ex. P189.)[21]

Despite the Sternfelds' efforts to find, or even create,[22] evidence that would paint FCA US's motivations in a negative light, DDI's conspiracy theory is disproven by the clear and convincing evidence showing DDI's half decade of terrible performance as one of the worst FCA US dealers in the state of California. The purpose of this termination proceeding has nothing to do with any effort by FCA US to consolidate the brands or relocate the dealership; the purpose is "just a lack of performance from the dealership. They're not getting the job done." (R.T. Vol. VIII, 62:23-63:3 (Chandler).) This termination seeks to end FCA US's losing business relationship and strengthen its

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[21] Throughout the Hearing and by written motion, FCA US repeatedly asserted that this Market Study is subject to the attorney-client privilege, as it was made at the request of, and for the consumption of, legal counsel. FCA US re-asserts its claim of attorney-client privilege over this document. There was no need for DDI to insist on the use of this document at the Hearing as it is consistent with the testimony and documentary evidence that had been admitted. Moreover, the Market Study is not a document drafted by FCA US's Network Operations group, but rather is created solely by the Market Representation group. The Market Representation group is tasked only with creating strategic goals for the company in order to design an optimized dealer network, but has no decision making authority when it comes to implementing that strategy. (R.T. Vol. V, 13:22-14:9 (Cholagh).) The Market Study is therefore not only privileged, it is irrelevant. And any testimony made by DDI's expert witness, Ted Stockton, regarding the Market Study is without value as Stockton acknowledged that he had no role in the creation of this document. (R.T. Vol. XV, at 69:24-70:1 (Stockton).)

[22] Nouri testified that, before he had become aware of these termination proceedings, his "general manager had called me and said that the owner from across the street was in his office and asking him if he could help him with any smoking guns so that would help him with his lawsuit against Chrysler so he could sell the dealership to us for less money." (R.T. Vol. VII, 5:24-6:5 (Nouri), 15:13-24 (same), 23:19-24:9 (same.) Van Ace confirmed the contents of his June, 2016 conversation with Ed Sternfeld, stating his interpretation of Ed Sternfeld's request for a "smoking gun" was that "if there was some sort of improprieties, that [Ed Sternfeld] would be able to utilize that in some fashion." (R.T. Vol. VII, at 140:2-141:12 (Van Ace).)

dealer network, but this is not an action taken without significant justifications and in full satisfaction of the requirements of California Vehicle Code Section 3061.

V. CONCLUSION

For the reasons outlined above, which are supported by the evidence presented during the Hearing, good cause exists to terminate DDI's Dodge and RAM franchises.

Dated: December 15, 2016

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PROOF OF SERVICE

CAPTION:	DDI, INC., Protestant v. FIAT CHRYSLER AUTOMOBILES, INC., Respondent
BOARD:	NEW MOTOR VEHICLE BOARD
PROTEST NOS.:	PR-2435-15, PR-2436-15

I am employed in the City and County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010.

On December 15, 2016, I served the foregoing **RESPONDENT FCA US LLC'S POST-HEARING BRIEF** on each party in this action, as follows:

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☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United states postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.

☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.

☒ (BY E-MAIL) at the e-mail address listed above.

Executed on December 15, 2016, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Erin Sanchez